EFT Holdings, Inc and another *v* Marinteknik Shipbuilders (S) Pte Ltd and another [2013] SGCA 64

Case Number	: Civil Appeal No 3 of 2013 and Summons No 3558 of 2013
Decision Date	: 29 November 2013
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Judith Prakash J
Counsel Name(s)	: Alvin Yeo, SC, Chen Xinping and Debra Lam (WongPartnership LLP) for the appellants; Haridass Ajaib and Mohammad Haireez (Haridass Ho & Partners) for the respondents.
Parties	: EFT Holdings, Inc and another — Marinteknik Shipbuilders (S) Pte Ltd and another

Conflict of Laws – Choice of Law – Tort

Tort – Conspiracy

[LawNet Editorial Note: The decision from which this matter arose is reported at [2013] 1 SLR 1254.]

29 November 2013 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

1 This is an appeal against the decision of the High Court Judge ("the Judge") in Suit No 571 of 2010 ("the Suit") dismissing the appellants' claim against the respondents in respect of an alleged conspiracy by unlawful means. The Judge's decision is reported as *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and others* [2013] 1 SLR 1254 ("the Judgment"). The present appeal raises some important issues as to the requisite mental element that must be established to sustain a claim for conspiracy by unlawful means; and on the principles and practice of pleading and proof of foreign law, in particular, in the context of a tort with foreign elements. At the end of the hearing, we reserved our decision and invited the parties to make further submissions on the issue of the mental element that must be proved for the tort of unlawful means conspiracy. We address all these issues, as well as the appeal against the Judge's factual findings, in this judgment.

Background to the appeal

Parties to the dispute

2 The first respondent, Marinteknik Shipbuilders (S) Pte Ltd ("Marinteknik") is a company incorporated in Singapore. Marinteknik is in the business of building and repairing ships, tankers and other ocean-going vessels. One David Liang and his family own Marinteknik. [note: 1] The second respondent, Priscilla Lim ("Ms Lim"), has been a director of Marinteknik since 8 January 1993. [note: 2]

3 The first appellant ("1st Appellant") is a company incorporated in the United States of America. On 30 June 2008, the 1st Appellant agreed to invest US$19.193m to acquire shares in Excalibur International Marine Corporation ("EIMC"), a company that had been incorporated in Taiwan on 29 June 2006. [note: 3] The second appellant ("2nd Appellant") is a subsidiary of the 1st Appellant and

was incorporated in Taiwan on 6 November 2008 to hold the acquired shares in EIMC. [note: 4] EIMC is a ferry operator that had been granted a licence to operate a ferry service across the Straits of Taiwan. [note: 5]

4 There were two other parties to the Suit. Mr Hsiao Zhong-Xing ("Mr Hsiao"), who was the third defendant in the Suit, was a director of EIMC. [note: 6] The fourth defendant in the Suit, Mr Lu Tso-Chun ("Mr Lu"), was thought to be a shareholder of EIMC pursuant to an agreement he entered into with EIMC on 11 July 2006 ("the Investment Agreement").

5 In the Suit, which was filed on 2 August 2010, the appellants claimed that the respondents, Mr Hsiao and Mr Lu had together engaged in a conspiracy by unlawful means to artificially inflate EIMC's paid-up capital by creating false documents which resulted in EIMC's equity and assets being overstated in its financial statements for the financial year ended 31 December 2007. The appellants claimed that Mr Lu never actually paid for the shares allotted to him in EIMC, contrary to what was stated in a number of documents. The overstated paid-up capital led the appellants to believe that EIMC was financially robust and induced them to invest in EIMC. [note: 7] The appellants sued for damages or a refund of the invested sum of US$19.193m. Mr Hsiao and Mr Lu did not enter an appearance to the Suit, and default judgment was entered against them. [note: 8]

The transaction between the respondents and EIMC for two catamarans

6 The facts giving rise to the dispute date back to November 2005 soon after Marinteknik commenced building two catamarans, Hull 189 and Hull 190 ("the Hulls"), with a view to selling them. It was apparently a seller's market in the shipbuilding industry at that time and Marinteknik received many enquiries concerning the possible purchase of the Hulls. [note: 9] EIMC was among those that expressed interest in the Hulls. Mr Bill Duan ("Mr Duan") of MaxMart Shipping & Trading Co, Ltd, who Ms Lim knew as EIMC's shipbroker in Taiwan, introduced Mr Hsiao to Ms Lim. [note: 10] Mr Lu also visited Marinteknik's shipyard in Singapore with Mr Duan and Mr Hsiao in November 2005 to discuss the purchase of the Hulls. Ms Lim was keen to sell the Hulls to EIMC to "give Marinteknik-built catamarans an opening into the cross-strait trade between Mainland China and Taiwan". [note: 11] At that time, Mr Lu was not yet (even ostensibly) a shareholder of EIMC though the impression conveyed was that he was somehow connected with it.

7 On 15 November 2005, Marinteknik and Mr Lu entered into two contracts for the sale and purchase of the Hulls ("the 2005 Shipbuilding Contracts"). The purchase price for each hull was originally US$25m, but this was subsequently increased to US$27.5m on 15 June 2006 due to some modification work. [note: 12]

8 According to Ms Lim, Mr Lu told her in late April or early May 2006 that he wanted the 2005 Shipbuilding Contracts to be novated to EIMC. Mr Duan subsequently contacted her in early May 2006 to confirm that EIMC would "take over" the 2005 Shipbuilding Contracts from Mr Lu and that Mr Hsiao was in the process of securing bank financing for EIMC for this purpose. [note: 13] Between May 2006 and early July 2006, EIMC kept Ms Lim informed of its efforts to secure bank financing for the Hulls.

9 In early July 2006, Ms Lim, evidently assured that EIMC had obtained bank financing for the Hulls, travelled to Taiwan in order to finalise matters in relation to EIMC's purchase of the Hulls. [note: 14] During her visit to Taiwan from 11 to 15 July 2006, Mr Duan and Mr Hsiao introduced Ms Lim to Mr Leo Wang from Union Insurance Company (Taiwan) ("Union Insurance") and representatives from

several other banks. These banks included Industrial Bank of Taiwan, Fuhwa Bank (Taiwan) ("Fuhwa Bank"), and Taishin International Bank (Taiwan) ("Taishin Bank"). [note: 15] The banks appeared keen to extend loans to EIMC in the light of the opening of direct links in transport and trade between Taiwan and China, and this further assured Ms Lim that EIMC would be able to meet its payment obligations under the 2005 Shipbuilding Contracts. [note: 16]

10 In the meantime, EIMC and Mr Lu signed the Investment Agreement dated 11 July 2006 in Taiwan. [note: 17] This provided, among other things, that Mr Lu would be allotted 48,750,000 ordinary shares in EIMC, and in return, Mr Lu would novate the 2005 Shipbuilding Contracts to EIMC. It was implicit in cl 2 of the Investment Agreement that Mr Lu had paid US$15m to Marinteknik for the Hulls and that the parties had agreed to enter into a tripartite agreement with Marinteknik ("the Tripartite Agreement") under which EIMC would assume Mr Lu's remaining debt of US$40m to Marinteknik. It is undisputed that Mr Lu had not in fact paid US$15m to Marinteknik when the Tripartite Agreement was signed. [note: 18] Marinteknik had in fact issued a letter dated 30 August 2006 rescinding the 2005 Shipbuilding Contracts as EIMC had yet to meet its payment obligations despite repeated promises that it would do so. [note: 19]

11 The Hulls were completed before 8 December 2006. [note: 20]

12 Between 30 August 2006 (when Marinteknik issued its letter rescinding the 2005 Shipbuilding Contracts) and 9 April 2007, Mr Hsiao repeatedly urged Ms Lim to give EIMC more time to pay for the Hulls. [note: 21] Ms Lim testified that although the 2005 Shipbuilding Contracts had been rescinded by the letter of 30 August 2006, Marintekink "kept the [2005 Shipbuilding Contracts] alive" at Mr Hsiao's request. [note: 22] As a matter of law, this was a contradiction in terms but we understand it to mean that Marinteknik continued to hope that a resolution could be found on the basis of the terms on which the 2005 Shipbuilding Contracts had been entered into. Ms Lim explained that she was keen for the Hulls to be deployed in the cross-strait route between China and Taiwan, and she had been told that EIMC had the exclusive licence to operate the ferry service there. [note: 23] Ms Lim also referred Mr Hsiao to one of her business contacts, Mr William Kim of Wooribank, Singapore ("Wooribank"), for his assistance in obtaining bank financing. [note: 24] EIMC kept Ms Lim informed of its attempts to secure bank financing from Wooribank, Union Insurance and other banks in Taiwan. [note: 25] However, when payment for the Hulls had still not been made by 9 April 2007, Marinteknik sent a letter of that date to EIMC stating that the 2005 Shipbuilding Contracts had been "officially rescinded". [note: 26]

13 According to Ms Lim, Ms Hsiao at this time asked for yet another chance for EIMC to comply with its payment obligations under the 2005 Shipbuilding Contracts. Ms Lim was given to understand that EIMC needed to show that Mr Lu had paid US$15m for the Hulls and that EIMC had acquired title to the Hulls. This, she was told, would "enable Taiwanese banks to *refinance* the purchase price of [the Hulls]" [emphasis added]. [note: 27] Between 9 and 24 April 2007, Ms Lim claimed that she was told by Mr Hsiao and by various banks (including The Chinese Bank (Taiwan), Wooribank, Chiao Tung Bank (Taiwan), Industrial Bank of Taiwan and Fuhwa Bank) [note: 28] that the banks would provide a letter of credit or a telegraphic transfer of monies for the Hulls on EIMC producing documentary evidence that the Hulls had been paid for and that it had title to the Hulls. [note: 29] Once such evidence was produced, the banks would register a mortgage over the Hulls and release payment of the money to Marinteknik. [note: 30] According to Ms Lim, once the payment from the banks was made to the tune of US$40m, the Hulls would be delivered against EIMC paying the remaining sum of US$15m.

14 Mr Hsiao apparently told Ms Lim that EIMC had to show evidence of title to the Hulls in the form of "affidavits". [note: 31] On 24 April 2007 at Marinteknik's shipyard in Singapore, Marinteknik, EIMC and Mr Lu signed two "affidavits" in relation to the 2005 Shipbuilding Contracts ("the Transfer Affidavits"). The Transfer Affidavits stated that Mr Lu and EIMC had paid for the Hulls in full and in consideration of the payment, "100 percent of shares" in the Hulls were transferred to Mr Lu. The Transfer Affidavits also stated that Mr Lu had paid US$7.5m for each hull, and EIMC had paid US$20m for each hull. [note: 32] Ms Lim said that she agreed to assist EIMC because Mr Hsiao told her that he would provide evidence by 24 April 2007 that monies would be remitted for the Hulls. In any case, the Transfer Affidavits would not in fact transfer ownership of the Hulls to EIMC. [note: 33]

15 When Ms Lim did not receive evidence of the remittance of monies by the close of business on 24 April 2007, she called Mr Hsiao, wanting it "to be placed on record" that EIMC had not paid for the Hulls. [note: 34] On Mr Hsiao's suggestion, Marinteknik, EIMC and Mr Lu agreed to enter into two addenda also dated 24 April 2007 ("the Transfer Affidavits Addenda"). The Transfer Affidavits Addenda stipulated, among other things, that EIMC agreed that Mr Lu had never paid Marinteknik US$7.5m for the Hulls and that title to the Hulls had not been transferred to EIMC. The Transfer Affidavits Addenda also provided that the Transfer Affidavits would become null and void if payment for the Hulls was not made by 24 July 2007.

16 On 6 July 2007, Mr Hsiao sent Ms Lim two letters. The first was a letter dated 5 July 2007 from the Industrial Bank of Taiwan ("IBT") addressed to Marinteknik in relation to the Hulls. IBT stated that they were "progressing into the final stages of the conditions precedent to the issuance of the letters of credit". [note: 35] The second letter was from EIMC to Marinteknik also dated 5 July 2007, and also in relation to the Hulls. This letter stated that EIMC "now [had] exclusive licensing support from the TaiChung Harbor Bureau and support from the wharf and ticketing offices, cargo and touring groups". It also stated that EIMC had increased its paid-up capital to US$15m and "our book recognize the paid-up capital to increase around USD25 million totally very soon". EIMC also stated in the same letter that it was "working very hard with our Bankers to fulfil the issuance of the letters of credit which we expect to receive very soon". [note: 36] Mr Hsiao also expressed that that EIMC "hope[d] to sign many more vessels with [Marinteknik]". [note: 37]

17 On 7 July 2007, Ms Lim wrote to Mr Hsiao noting that EIMC had provided documentary evidence of its attempts to obtain financing despite the 2005 Shipbuilding Contracts having been "officially cancelled". Ms Lim also stated as follows: [note: 38]

> …
>
> Your pleas for assistance are continuously noted and highlighted to our management. Should your financing with IBT be successful, we can in future consider signing newbuilding vessels with you.
>
> Good luck to you on your financing and hopefully we can work together again.
>
> …

18 On 13 July 2007, Marinteknik signed a "Letter of Undertaking" under which it agreed to assist EIMC to sell the Hulls to any third party at 75% of the "original price sold to [EIMC]" in the event that EIMC was not able to fulfil the conditions of a loan obtained from its bankers. Under the terms of the "Letter of Undertaking", if Marinteknik was able to sell the Hulls at a price higher than 75% of the price that it had transacted with EIMC, it could keep the difference. Marinteknik would also receive a

fee of "two percent (2%) from the Bankers based on the 75% original purchase price by the Buyer/Owner". [note: 39] Ms Lim testified that Fuhwa Bank and Taishin Bank required Marinteknik to execute this as they wanted the assurance that Marinteknik would help them to sell the Hulls should EIMC default on its bank loans. [note: 40]

19 On 15 January 2008, EIMC still had not paid for the Hulls, and Marinteknik sold the Hulls to a Hong Kong company, Giant Dragon Sea Transport Company Limited, at US$30m for each hull. [note: 41]

The Ocean Lala, the Hull 189A and the Hull 190A

20 In April 2008, Mr Hsiao told Ms Lim that he wanted to purchase a secondhand catamaran for its ferry service. [note: 42] He approached Ms Lim with a view to purchase the *Ocean Lala* (then called the *Nixe 2*), a Marinteknik-built vessel which was then trading in Spain. Marinteknik had built this vessel and sold it to a Spanish ferry operator in April 2004. The registered owner of the *Nixe 2* in April 2008 was Eurolineas Maritimas SA ("Eurolineas").

21 On 17 June 2008, EIMC entered into a memorandum of agreement ("MOA") with Ezone Capital Limited ("Ezone"), a company incorporated in the British Virgin Islands, to purchase the *Nixe 2* for €16m. [note: 43] Ms Lim was a director and shareholder of Ezone. [note: 44] Initially, Mr Hsiao wanted Marinteknik to approach Eurolineas in relation to the purchase of the *Nixe 2*. However, Marinteknik did not wish to be involved in this transaction because it was not in the business of purchasing secondhand vessels. At the same time, Eurolineas was not comfortable dealing with EIMC directly as EIMC was a new entrant to the shipping industry with no track record. [note: 45] It was thus agreed that Ezone would purchase the *Nixe 2* from Eurolineas and sell it to EIMC at a profit. [note: 46]

22 EIMC apparently remained keen to purchase two vessels from Marinteknik. [note: 47] Mr Hsiao told Ms Lim that EIMC could lose its ferry licence unless it could show that it had a contract to buy vessels from Marinteknik. The contract had to bear the same hull numbers and specifications as the Hulls because EIMC had used the specifications and the numbers of the Hulls to apply for its ferry licence. [note: 48]

23 Marinteknik and EIMC eventually agreed to execute two documents titled "Memorandum of Understanding" dated 30 April 2008 ("April MOUs") for Hull 189A and Hull 190A. The April MOUs stated that the price of Hull 189A and Hull 190A was €26m each, and that the sum of US$7.5m paid as down payment for each of the Hulls would be "transferred" to pay for Hull 189A and Hull 190A. Mr Hsiao apparently told Ms Lim that if EIMC could tender evidence that US$15m had been paid for these vessels, the bank would provide a "letter of credit or transfer" for the full purchase price. [note: 49] On 15 May 2008, Mr Hsiao told Ms Lim that "the funds are ready" [note: 50], and the April MOUs were executed and notarised on the same day. [note: 51] However, the funds did not in fact come in that day. Marinteknik, EIMC and Mr Lu therefore executed two addenda also dated 30 April 2008 ("April MOUs Addenda") to state that the US$7.5m was never paid to Marinteknik and that the April MOUs would be treated as "null and void" if the first instalment for Hull 189A and Hull 190A was not paid by 9 June 2008. [note: 52]

24 On 9 June 2008, Ms Lim wrote to EIMC stating that it would be rescinding the contracts for the building of Hull 189A and Hull 190A because the first instalment payment for these two vessels had not been made by that date. [note: 53]

Events leading to the appellants' investment in EIMC

25 On 20 June 2008, Mr Jack Jie Qin ("Mr Qin"), the 1st Appellant's chairman and chief executive officer, visited Taiwan. During this trip, acquaintances of Mr Jen-Ho Chiao ("Mr Chiao"), a director of EIMC, told Mr Qin of a business opportunity arising from the opening of trade links between Taiwan and China. They asked if he was interested to meet Mr Chiao, an influential man and a political figure. [note: 54] He met Mr Chiao for the first time on 23 June 2008. On 24 June 2008, Mr Qin and one Ms Phoebe Liu (Mr Qin's friend) [note: 55] met Mr Chiao and Mr Hsiao at EIMC's office in Taiwan. [note: 56] According to Mr Qin, he was shown the following documents during a business presentation on 24 June 2008 ("the Documents"):

(a) the 2005 Shipbuilding Contracts;

(b) the Investment Agreement;

(c) the Tripartite Agreement;

(d) the Transfer Affidavits;

(e) Lloyd's Register Certificate Nos SNG 0401068 and SNG 0401070 dated 25 August 2006 which certified that the Hulls were 90% complete as at that date;

(f) two reports from Richie & Bisset (Far East) Pte Ltd dated 12 December 2006 on the valuation of the Hulls; [note: 57] and

(g) EIMC's audited financial statements for the financial years ended 31 December 2006 and 31 December 2007 (which were certified on 31 March 2008) ("the 2006/2007 Financial Statements").

26 According to Mr Qin, Mr Chiao told him that EIMC had signed the 2005 Shipbuilding Contracts with Marinteknik, a well-known shipbuilding company. Mr Chiao also told him that the Hulls had been sold and the proceeds of sale were used to purchase another two vessels from Marinteknik. These vessels would be completed in two to three years. He was told that without the investment, EIMC could lose its ferry licence, [note: 58] and that Ms Lim had recommended that EIMC purchase the *Nixe 2*. He was also told that Ms Lim had prepared the Documents except for the Investment Agreement. [note: 59] Mr Qin noted and queried a liability of NTD 1.3b recorded as "payable" in the 2006/2007 Financial Statements. Mr Chiao told him that this liability was due to loans obtained by EIMC in 2007 to finance the purchase of the Hulls. [note: 60] Mr Qin assumed that this liability had been discharged and that "new liabilities were incurred for the purchase of the two new vessels". [note: 61] He claimed that he was persuaded that EIMC was a financially strong and robust company given that its assets were more than its liabilities [note: 62] and decided to invest in EIMC.

27 The investment was effected in the following manner: On 30 June 2008, the 1st Appellant entered into a subscription agreement ("Subscription Agreement") with EIMC, agreeing to invest US$19.193m for 58,800,000 shares in EIMC. We pause to note that the Subscription Agreement appeared to have been hurriedly prepared and entered into so that the *Nixe 2* could be purchased. [note: 63] Pending the incorporation of the 2nd Appellant, the 1st Appellant advanced US$19.93m to

EIMC under a loan agreement ("the Loan Agreement"). [note: 64] After the 2nd Appellant was incorporated, the 1st Appellant transferred a further sum of another US$19.93m to the 2nd Appellant on or about 22 October 2008, [note: 65] with which the latter paid EIMC for its shares. EIMC then used this money to repay the 1st Appellant for the amount it had earlier received under the Loan Agreement.

28 As for the purchase of the *Nixe 2*, EIMC paid Ezone €1.6m on 7 July 2008 and €12.4m on 30 July 2008. [note: 66] The bulk of the purchase price for the *Nixe 2* was obtained from the loan provided to EIMC by the 1st Appellant. After receiving payment for the *Nixe 2* from EIMC, Ezone entered into a Memorandum of Agreement with Eurolineas on 31 July 2008 to purchase the *Nixe 2* for €12.95m. The *Nixe 2* was delivered to EIMC on 19 August 2008, with €2m of the purchase price still outstanding to Ezone. The *Nixe 2* was eventually renamed the *Ocean Lala*. [note: 67]

29 The 1st Appellant took over the management of EIMC in November 2008. [note: 68] It appeared that the cross-strait ferry services started in June 2009. However, after one year of operation, the *Ocean Lala* sustained severe weather damage and was declared a constructive total loss. [note: 69]

30 On 26 November 2009, the appellants filed Originating Summons No 1359 of 2009 for pre-action discovery against the respondents, [note: 70] and subsequently commenced the Suit claiming damages for unlawful means conspiracy, dishonest assistance and knowing receipt. By the time of the trial before the Judge, the appellants had decided to pursue only the claim for conspiracy by unlawful means. [note: 71]

31 We should also mention that on 16 June 2010, Ezone commenced arbitral proceedings against EIMC in London claiming the balance owed by EIMC for the *Ocean Lala*. EIMC brought a counterclaim against Ezone, alleging that the *Ocean Lala* was not fit for its intended purpose. As at 1 March 2012, the arbitral tribunal had not rendered its award, [note: 72] and the parties did not provide further information as to the outcome of the arbitration.

The decision below

32 The Judge dismissed the Suit on the basis that the appellants had failed to plead and prove Taiwan law in respect of its claim for conspiracy by unlawful means. Although the parties did not plead or raise any issue of Taiwan law in relation to the claim for unlawful means conspiracy, [note: 73] the Judge thought that the parties had proceeded on the incorrect basis that the laws of Taiwan and Singapore on unlawful means conspiracy should be treated as identical. On 22 November 2012, *after* closing submissions had been tendered, the Judge invited the parties to consider whether the appellants were required to plead and prove the actionability of the claim for unlawful means conspiracy under Taiwan law. The appellants' counsel in the court below, Mr Hee Theng Fong ("Mr Hee"), submitted that Singapore was the place of the tort and that there was no need to plead and prove Taiwan law. [note: 74]

33 The Judge disagreed with Mr Hee. She held that Taiwan was the place of the tort (the Judgment at [77]), and that the double actionability rule required the appellants to show that the wrongs were actionable under the laws of both Taiwan (the place where the tort was committed) and Singapore (the forum). She also held that the presumption that the foreign law should be treated as being the same as Singapore law would not avail in this case. The Judge held that the laws of Taiwan were likely to be different from Singapore, as Taiwan is a civil law jurisdiction and the court could take

notice of that fact (the Judgment at [85]). Since the appellants had failed to prove actionability of their claim under Taiwan law, the Suit was dismissed.

34 However, for completeness, the Judge also considered the claim for unlawful means conspiracy and found that it was not made out. In this regard:

(a) The Judge held that the mental element for the tort of unlawful means conspiracy is actual intention or reckless indifference. A defendant's foresight that his or her conduct might or will in all probability damage the plaintiff is not sufficient (the Judgment at [67]).

(b) The appellants could not show that the respondents were party to a combination to mislead the appellants into investing in EIMC (the Judgment at [125]). There was no evidence that Mr Chiao's and Mr Hsiao's representations were made and that the Documents were shown to Mr Qin on behalf of the respondents or with their knowledge. The fact that the Transfer Affidavits Addenda were withheld from Mr Qin spoke of deceit and fraud on the part of Mr Hsiao and EIMC rather than the respondents (the Judgment at [121]–[122]). Even if the respondents knew that the Documents would be shown to Mr Qin and did not stop Mr Chiao or Mr Hsiao from doing so or had reckless disregard for whether the Documents would be used to defraud potential investors, this was not sufficient to show that they were party to the conspiracy (the Judgment at [125]–[126]).

(c) Between 24 April 2007 and 24 July 2007, at least as far as the respondents were concerned, the plan hatched with EIMC, Mr Hsiao and Mr Lu had been to obtain money from the banks in Taiwan by deception with a view to enabling EIMC to purchase the Hulls. The Transfer Affidavits had been designed to "show a false picture of Mr Lu's interests in [the Hulls]" to enable EIMC to issue paid-up shares in Mr Lu's name and then to obtain loan facilities by deception (the Judgment at [138]).

(d) The Judge rejected the appellants' argument that the respondents continued to perpetuate a "fraud" well into 2008 as evidenced by the April MOUs. The April MOUs and the April MOUs Addenda were signed before Mr Qin had met or even heard of Mr Chiao and Mr Hsiao and well before Mr Qin visited Taiwan on 20 June 2008 (the Judgment at [142]). There was no evidence that the respondents knew that a potential investor who would first appear on the scene in June 2008 would come to rely on the Documents which had been issued in connection with a different transaction (the Judgment at [153]).

(e) It followed from the failure to prove that the respondents were party to a conspiracy to cheat the appellants into investing in EIMC that the element of intention for a claim for unlawful means conspiracy was not satisfied.

35 We should also mention that there were related proceedings taken out in Taiwan as described in the Judgment (at [12]–[18]). The Judge did not find any of these proceedings relevant to the issues and as they did not arise in this appeal, we need say no more about them.

The parties' cases in this appeal

36 In the present appeal, the appellants submit that it is for the respondents to plead and prove that the claim for unlawful means conspiracy was not actionable under Taiwan law. As all parties proceeded on the assumption that the laws in Taiwan and Singapore on unlawful means conspiracy were the same, the Judge should not have found for the appellants on this issue. The appellants further submitted that an agreement between the respondents, Mr Lu and Mr Hsiao and the requisite

intention to defraud the appellants could be inferred from the contemporaneous documentary evidence. In oral submissions, the appellants' counsel, Mr Alvin Yeo, SC ("Mr Yeo"), argued for a *mens rea* of reckless indifference instead (see below, at [66]–[67]), and we address this in the portion of this Judgment where we deal with what we have termed "Issue 3".

37 The respondents on the other hand submit that the failure to plead foreign law was fatal to the appellants' claim and the presumption that the *lex fori* applies where foreign law is not pleaded should not avail in this case. [note: 75] The respondents also submit that the appellants did not rely on the Documents but had invested in EIMC on the basis of Mr Chiao's representations about the potential for profits arising out of the cross-strait ferry business. The appellants could not show that Mr Qin had in fact been given the Documents at the meeting on 24 June 2008. [note: 76] In any event, a person of Mr Qin's expertise would have known from the 2006/2007 Financial Statements that EIMC was not financially robust.

The issues before this court

38 The first issue that arises for our determination is the factual issue of what had been agreed between the respondents, Mr Lu and Mr Hsiao and whether it extended to misleading the appellants into investing in EIMC through the creation of documents which conveyed a false impression of EIMC's financial health. We term this "Issue 1".

39 We then consider whether the Judge should have dismissed the Suit on the ground that the appellants did not plead and prove that its claim for unlawful means conspiracy was actionable in Taiwan. This we term "Issue 2". Finally under Issue 3, we examine whether the elements of the claim for unlawful means conspiracy, and in particular, whether the elements of combination and intention, were made out in this case.

Issue 1: The nature of the agreement between the respondents, Mr Lu and Mr Hsiao

What was the plan between the respondents, Mr Lu and Mr Hsiao?

40 The Judge found that the contents of the Transfer Affidavits were plainly false and had been designed to lead the banks to believe that Mr Lu and EIMC had paid for the Hulls (the Judgment at [135]). She accepted Ms Lim's testimony that the Transfer Affidavits and the Transfer Affidavits Addenda were referable to the sale and purchase of the Hulls (the Judgment at [135]) and that the objective of the plan between EIMC, Mr Hsiao, Mr Lu and the respondents was to deceive the banks into advancing the necessary funds that would enable EIMC to pay for the Hulls. We agree with the Judge's findings on this at least insofar as the respondents are concerned.

41 In our view, the evidence revealed that from 15 November 2005 to the time the April MOUs and the April MOUs Addenda were signed, the respondents had consistently been under the impression that financing for the purchase of the Hulls would come from banks rather than by way of an equity injection. The 2005 Shipbuilding Contracts expressly contemplated that bank financing would be used to fund the purchase of the Hulls. Clause 3.04 of the 2005 Shipbuilding Contracts provided that 80% of the purchase price for each of the Hulls would be paid on approval of a bank loan with payment to be made by an irrevocable letter of credit or a telegraphic transfer. [note: 77]

42 The correspondence between the parties also reveals that the category of financiers contemplated by the respondents, Mr Hsiao and Mr Lu were the banks. Between May 2006 and early July 2006, EIMC sent Ms Lim a series of e-mails evidencing its attempts to secure bank financing to

meet its payment obligations under the 2005 Shipbuilding Contracts.

(a) On 5 May 2006, Mr Duan emailed Ms Lim referring to a letter from Mr Hsiao which stated that they had approached Chiao Tung Bank (Taiwan) which had agreed to extend a loan of 80% of the purchase price for the Hulls, and to issue a bankers' guarantee or a letter of credit after it had registered its interest in the Hulls. [note: 78] On 16 May 2006, Mr Hsiao informed Ms Lim that there would be a delay in the remittance of funds for the Hulls because of "some change in EIMC's shareholders", [note: 79] but he expected US$2.5m for Hull 189 and US$2.5m for Hull 190 to be transferred to Marinteknik's bank account with Malayan Banking Berhad of Singapore, by 22 May 2006 and 29 May 2006 respectively. The letter of credit for the balance purchase price was expected to be issued not later than 29 May 2006. [note: 80]

(b) On 8 June 2006, Mr Duan informed Ms Lim that it had approached yet another bank, Union Insurance which was part of the Chinese Bank (Taiwan) ("the Chinese Bank"), to obtain financing for the purchase of the Hulls. On 26 June 2006, Mr Hsiao also sent an email to Ms Lim through Mr Duan's co-broker, one Mr Andrew Lau, informing her that in his discussion with the Chinese Bank on the "L/C schedule" for the Hulls, he had said that EIMC had paid a deposit of US$10m for the Hulls (even though this was not true). Mr Hsiao asked Ms Lim to "keep the secret of this discussion with the bank to smoothly speed up the process of the bank loan". [note: 81] It was evident from this that EIMC had resorted to presenting a false picture of its interest in the Hulls to attempt to procure bank financing.

(c) Even after the 2005 Shipbuilding Contracts were "rescinded" by Marinteknik on 30 August 2006 and 9 April 2007, Mr Hsiao continued to keep Ms Lim informed of negotiations with various banks for financing. On 16 April 2007, Ms Lim sent a letter to Mr Hsiao referring to a conversation regarding the Hulls, and stated as follows: [note: 82]

> Taking into account your continuous pleas to assist you despite your inability to perform so far, and our official rescindment notice, for good will sake, we will assist you for the final time.
>
> The assistance rendered to you shall only be documentary in regards to securing your financing and for no other purpose whatsoever.
>
> The above does not qualify for reinstatement of our contracts with you. ... We will of course keep our options open and may in future look into signing other newbuilding contracts with you for mutual benefit provided you are totally able to secure your financing and fulfill all the terms of the contracts.
>
> ...

(a) Ms Lim testified that notwithstanding her letter of 16 April 2007, she was willing to sell the Hulls to EIMC if EIMC could secure bank financing. [note: 83]

43 The Transfer Affidavits and the Transfer Affidavits Addenda were also executed in response to Mr Hsiao's pleas for assistance in showing evidence of title to the Hulls to the banks in Taiwan so that EIMC could negotiate a suitable refinancing arrangement. Similarly, Marinteknik and EIMC signed the April MOUs on Mr Hsiao's instigation, to enable EIMC to negotiate with the banks on the basis that Marinteknik was building vessels for EIMC. [note: 84]

44 In our judgment, it is clear that the respondents agreed to participate in a plan with Mr Hsiao and Mr Lu where they would practice a deceit on the banks in Taiwan in order to enable EIMC to obtain bank financing with which to complete the sale and purchase of the Hulls.

The documents created to carry out the plan

45 To perpetrate the false impression that EIMC had made a down payment or had acquired title to the Hulls with a view to enabling EIMC to secure loans more easily, several documents containing false statements were created. The Investment Agreement provided that Mr Lu agreed to invest "his assets" in the form of the Hulls in return for shares in EIMC. It also stated that Mr Lu had paid US$15m to Marinteknik for the Hulls when this was not true. Although the respondents were not party to the Investment Agreement, some of these false statements were at least implicitly repeated in the Tripartite Agreement which was executed by Ms Lim on behalf of Marinteknik, Mr Lu, and Mr Hsiao. According to Ms Lim, she signed the Tripartite Agreement (which was undated) during her visit to Taiwan between 11 and 16 July 2006. [note: 85] The Tripartite Agreement stated that EIMC had paid US$100,000 to Marinteknik on 7 July 2006 and that this was part of the "final balance money" paid by Mr Lu to Marinteknik. Thereafter, EIMC would take on Mr Lu's liability under the 2005 Shipbuilding Contracts. Notably, the Tripartite Agreement also provided for payment of the balance purchase price by way of a letter of credit. The Tripartite Agreement stated: [note: 86]

> 2. [Marinteknik] and [Mr Lu] and [EIMC] agree that at the time of the delivery of the vessel under the [2005 Shipbuilding Contracts]:
>
> (a) [EIMC] shall pay to [Marinteknik] the balance of contract price of US Dollars Twenty Million (USD20,000,000) in the name of the HULL 189 by irrevocable L/C way by end of July 2006.
>
> (b) [Marinteknik] shall delivery the vessel to [Mr Lu] within 8 weeks upon receiving the irrevocable L/C of Hull 189 from [EIMC].
>
> (c) [EIMC] shall pay to [Marinteknik] the balance of contract price of US Dollars Nineteen Million and Nine Hundred Thousand (USD19,900,000) in the name of HULL 190 by irrevocable L/C way by a mutual agreed date within 2006. The amount US$100,000 as clause 2, mentioned to be treated as the advance payments guarantees of HULL 190 to [Marinteknik].

When she was cross-examined on the Tripartite Agreement, Ms Lim insisted that the Tripartite Agreement did not convey the impression that US$15m had already been paid to Marinteknik, [note: 87] and that this was a US$15m "credit" to Mr Lu which would be paid on delivery of the Hulls to EIMC. [note: 88] Whatever might have been in Ms Lim's mind, the reasonable impression conveyed by the Tripartite Agreement was that the only outstanding obligation under the 2005 Shipbuilding Contracts was payment of the aggregate sum of US$39.9m for the Hulls.

46 The Transfer Affidavits also stated that the Hulls were paid for in full and that EIMC had title to the Hulls. These were executed with a view to assist EIMC to increase its paid-up capital to reflect the consideration of US$15m from Mr Lu (which he had not in fact given). This was confirmed in the Transfer Affidavits Addenda. The addendum for Hull 189 stated that: [note: 89]

> ... whereby the said deposit amount [*ie* $US7.5 m] was reflected in [the Transfer Affidavit] ***for usage on documentation only to assist [EIMC] in increasing their Paid-up Capital.*** There was no physical payment of funds made whatsoever. The said amount is still owns by the Buyers

of Hull 189...

Also, the aforesaid transfer of shares and title of the said vessel and all other assigns were never effect physically.

Supposedly by 24th July 2007, [Mr Lu] and [EIMC] are unable to fulfil the SHIPBUILDING CONTRACT HULL 189 to pay the total contract price of USD 27,500,000. for the vessel to Marinteknik, the [Transfer Affidavits] shall be treated null and void immediately.

…

[emphasis added in bold italics]

The deadline of 24 July 2007 was stipulated to reflect Marinteknik's willingness to assist EIMC in obtaining bank financing for a limited period of time only. After the Transfer Affidavits Addenda had been executed, EIMC assured Ms Lim that it was working hard to secure bank financing (see above, at [16]).

47 As for the April MOUs and the April MOUs Addenda (which had *not* been shown to Mr Qin), these documents also were created to enable EIMC to convey the false impression to the banks in Taiwan that Mr Lu paid US$15m for the Hulls. The April MOUs Addenda provided that:

... ***the payment of USD 7,500,000.00 as deposit for the subject vessel was never paid or transferred to [Marinteknik] ... whereby the said deposit amount was reflected in the Affidavit for usage on documentation only to assist [EIMC] in increasing their Paid-up capital*** . There was no physical payment of funds made whatsoever. The said amount is still owing by [EIMC] for Hull 189A in accordance [*sic*] with the Shipbuilding Contract to the builder of the vessel.

Also any transfer of shares and title of the said vessel and all other assigns were never effected physically.

Supposedly by 09th June 2008, [Mr Lu] and [EIMC] are unable to fulfil the SHIPBUILDING CONTRACT for Hulls 189A and pay the 1st Instalment of the contract price for the vessel, the Memorandum of Understanding dated 30th April 2008 shall be treated as null and void immediately.

…

[emphasis added in bold italics]

48 The appellants argue that these documents support their case that Ms Lim was ambivalent as to the source of financing, the respondents' only interest being that EIMC could raise the funds to pay for the Hulls in full. While it might be true that securing payment for the Hulls was the uppermost concern of the respondents, it cannot be overlooked that the *only* scheme that was ever discussed between the parties in order to achieve this, was one to get a bank in Taiwan to finance the transaction. This was the only plan to which the respondents were privy to as evidenced by the documents, the discussions and the correspondence between the parties.

EIMC and/or its officers use the documents to procure the appellants' investment

49 According to the appellants, Mr Hsiao and Mr Chiao showed Mr Qin the 2005 Shipbuilding Contracts, the Investment Agreement, the Tripartite Agreement and the Transfer Affidavits on 24 June 2008 to persuade him to invest in EIMC by conveying the impression that EIMC was financially robust.

50 As noted by the Judge, there was no evidence that Ms Lim knew that EIMC had approached the appellants. Ms Lim's undisputed evidence was that she had known nothing about the appellants and the investment that they had made until the pre-action discovery proceedings were initiated in November 2009. The first time Mr Qin met Mr Chiao was on 23 June 2008, which was more than a month after the April MOUs were notarised (though these were not show to Mr Qin) and more than a year after the last of the documents that Mr Qin did see and to the creation of which the respondents were privy, had been created. We agree with the Judge that what Mr Chiao and Mr Hsiao did with the Documents was different from what had been contemplated by Marinteknik when it executed the Tripartite Agreement and the Transfer Affidavits. We also note that based on Mr Qin's account of what had transpired at his meeting with Mr Chiao on 20 June 2008, Mr Chiao had assured him that (1) EIMC had sold the Hulls and used the proceeds to purchase other vessels; (2) Ms Lim had prepared most of the documents; and (3) a liability reflected on EIMC's 2006/2007 Financial Statements was in respect of loans obtained by EIMC to purchase the Hulls. These were additional falsehoods that were not *in any way* attributable to the respondents on the basis of the evidence presented. Most crucially, it is evident that the falsehood practised on Mr Qin had *nothing* whatsoever to do with raising funds to pay the respondents for the Hulls (which had, by then, been sold). The interest in selling the Hulls had all along been the *only* interest that the respondents had; in particular, they never had any interest in a fraud by the principals of EIMC to rob a potential equity investor. In our judgment, the respondents were not a party to the fraudulent plan that was carried out by EIMC and its principals, which was an altogether different plan to the one that had been hatched with the respondents but which was not ultimately carried out.

Issue 2: Whether the Judge should have dismissed the Suit on the appellants' failure to plead the actionability of its claim under Taiwan law

51 Against this factual backdrop, we turn to the choice of law issue which was the ground on which the Suit was dismissed by the Judge.

Choice of law rule for tort

52 For a tort to be actionable in Singapore, the alleged wrong must be actionable not only under the law of the forum (the *lex fori*) but also under the law of the place where the wrong was committed (the *lex loci delicti*) (*Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw*") at [53]). This is subject to the flexible exception recognised in *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 that a tort might be actionable even if one of the limbs of the double actionability rule is not satisfied. The flexible exception might apply where the *lex fori* and/or *lex loci delicti* "are purely fortuitous and the application of either or both limbs of the 'double actionability rule' would result in injustice and unfairness" (*Rickshaw* at [56]–[58]). These principles apply to actionability of claims in tort wherever committed (*Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2013) ("*Halsbury's Singapore*") at para 75.373; *Rickshaw* at [64]).

53 To identify the place where the tort was committed, the court applies the "substance of the tort" test by examining the series of events constituting the elements of the tort to determine where, in substance, the cause of action arose (*Wing Hak Man and another v Bio-Treat Technology Ltd and others* [2009] 1 SLR(R) 446 at [26]). The key factors to consider for the tort of conspiracy are "the identity, importance and location of the conspirators, the locations where any agreements or

combinations took place, the nature and places of the concerted acts or means, the location of the plaintiff and the places where the plaintiff suffered losses" (*Halsbury's Singapore* at para 75.378).

54 In this case, the Judge found that Taiwan was the place where the tort arose. She found that the representations were made and the Documents were shown to Mr Qin in Taiwan to procure his investment in EIMC, a company incorporated in Taiwan. The Documents had been used with the intention of obtaining financing in Taiwan for the purposes of EIMC's cross-strait ferry business. The Investment Agreement and Tripartite Agreement were signed in Taiwan. The appellants suffered their losses in Taiwan. On the other hand, the relevant (and relatively modest) connections to the forum are that the Transfer Affidavits and the Transfer Affidavits Addenda were signed in Singapore [note: 90]. As for the place where the alleged agreement or combination was formed, this was a neutral factor because Mr Hsiao, Mr Chiao and Ms Lim met in Singapore and in Taiwan and corresponded by email as well. On balance, the factors leant in favour of a finding that Taiwan was where, in substance, the tort was committed. Having considered the matter, we see no reason to interfere with the Judge's finding in this respect. Nor did the appellants argue that the Judge erred in this finding.

Principles on the pleading of foreign law

55 The appellants' main contention on this issue was that the onus lay on the respondents, if they wished to rely on this, to plead the non-actionability of the claim for unlawful means conspiracy under Taiwan law, and given that they had not pleaded this, the Judge should not have dismissed the Suit on this point. The appellants argue that, at the very least, they should have been given the opportunity to adduce evidence of Taiwan law to address the Judge's concern. In this regard, the appellants filed Summons No 3558 of 2013 ("the Summons") on 11 July 2013 for leave to adduce, by way of further evidence in this appeal, an affidavit dated 9 July 2013 by Sam-Rong Hwang, a partner with Formosa Transnational Attorneys at Law in Taiwan, enclosing an expert report on the following questions:

(a) whether under Taiwan law, there is a civil cause of action for unlawful conspiracy which is the same as, or substantially similar to the action for unlawful means conspiracy under Singapore law;

(b) if so, what are the elements necessary to establish this cause of action under Taiwan law; and

(c) whether an actionable wrong in Taiwan is made out on the facts of the appellants' case.

56 We first turn to the applicable principles on pleading and proof of foreign law. In *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey, Morris and Collins*"), the learned authors note (at paras 9-002 to 9-004):

(**1**) **Foreign law a fact.** The principle that, in an English court, foreign law is a matter of fact has long been well established: it must be pleaded, and it must be proved: … It is also said to follow that if the parties elect not to prove the content of foreign law, a case will be decided by the application of English domestic law as though the case were a wholly domestic one, and this is generally true. But in recent years there have been increasing signs that this cannot invariably follow, and in cases where it would be wholly artificial to apply rules of English law to an issue governed by foreign law, a court may simply regard a party who has pleaded but who failed to prove foreign law with sufficient specificity as will allow an English court simply to apply it, as having failed to establish his case without regard to the corresponding principle of English domestic law.

(i) *Foreign law must be pleaded*. The general rule is that if a party wishes to rely on a foreign law he must plead it in the same way as any other fact. Unless this is done, the court will decide a case containing foreign elements as though it were a purely domestic English case. …

(ii) *Foreign law must be proved*. English courts take judicial notice of the law of England and of notorious facts, but not of foreign law. Consequently, foreign law must be proved in each case: it cannot be deduced from previous English decisions in which the same rule of foreign law has been before the court, although such decisions may be admissible in evidence for the purpose of proving foreign law. Indeed it is perfectly possible for the English court to reach different conclusions in different cases as to the effect of a given rule of foreign law.

…

The learned authors then proceed to list exceptions to the rule that the court does not take judicial notice of foreign law, including where the foreign law is a notorious fact (such as the fact that roulette is not unlawful in Monte Carlo: *Saxby v Fulton* [1909] 2 KB 208 at 211) or if the content of the foreign law is, at least in part, determined by a rule under English law or if the foreign law is the same as or substantially similar to English law (*Dicey, Morris and Collins* at paras 9-005 to 9-006).

57 These principles are premised on the notion that the court lacks knowledge of foreign law and must be informed of its content by evidence from the parties and not take judicial notice of it (Richard Fentiman, "Law, Foreign Laws, and Facts" (2006) 59 Current Legal Problems 391 ("*Law, Foreign Laws, and Facts*") at p 396). In the Singapore context, regard must also be had to s 59 of the Evidence Act (Cap 97, 1997 Rev Ed) which sets out the facts of which judicial notice shall be taken and for which proof is not required. Although foreign law is treated as a question of fact in England and in Singapore (see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [54]), there is discernible discomfort amongst courts in the common law tradition with the characterisation of foreign law as a pure question of fact, due to the legal quality inherent in this "fact", and for this reason foreign law has sometimes been described as a "special fact" (*Law, Foreign Laws, and Facts* at p 396). This has given rise to issues, in particular, in the establishment of the content of foreign law (*Law, Foreign Laws and Facts* at pp 392–393). For example, the Singapore courts have taken judicial notice of the likelihood that foreign law may differ in content from Singapore law in cases of *forum non conveniens* (*Halsbury's Singapore* at para 75.297; *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [96] citing *Rickshaw* at [43]).

58 Notwithstanding these difficulties, it remains established by the various case authorities that, in general, if foreign law is not pleaded, Singapore courts will simply apply Singapore law (*Halsbury's Singapore* at para 75.296). This is subject to exceptions, for example, where a mandatory pleading of foreign law is required as a matter of law (*Goh Chok Tong v Tang Liang Hong* [1997] 1 SLR(R) 811 ("*GCT*") at [84]; see also *Parno v SC Marine Pte Ltd* [1999] 3 SLR(R) 377 at [44]). In *GCT*, the defendant applied to strike out a claim for defamation on the ground that the plaintiff had not pleaded actionability of this claim under the law of Malaysia (the place where the slander was uttered and the tort of authorising the publication was committed). The High Court in *GCT* held that in relation to the double actionability rule, a plaintiff is not required to plead actionability under a foreign law, and in the absence of such pleading, a tort claim involving foreign elements may be treated as if it were a domestic Singapore case (*GCT* at [85]–[89]). The Law Reform Committee of the Singapore Academy of Law in a report of 31 March 2003 titled "Reform of the Choice of Law Rule Relating to Torts" also noted that while the pleading of the applicable law for tortious claims is desirable, it is not mandatory in Singapore (at paras 29–30). In commenting on *GCT*, Yeo Tiong Min in "Private International Law:

Recent Developments in Singapore" (1997) 1 Singapore Journal of International & Comparative Law 560 observed (at p 586) that:

> The specific question that Lai J addressed [in *GCT*] was whether the double actionability rule had to be stated in every pleading alleging a foreign tort. The learned judge held that it was not necessary, as foreign law is presumed to be the same as the *lex fori* unless shown to be different, and the defendant has the option of pleading foreign law to exonerate himself. Thus, if neither party pleads foreign law, the case will be dealt with as if it is a purely domestic case. In so holding, this case flatly contradicts the controversial Malaysian Federal Court decision in *Chan Kwon Fong v Chan Wah* (not cited in the Singapore decision), that had dismissed a plaintiff's claim for failing to adduce foreign law to prove actionability by the *lex loci delicti*. ***Although there are English authorities going both ways, the Singapore position is probably more consistent with general principles.*** ...
>
> [emphasis added in bold italics]

59 In *Dicey, Morris and Collins* at para 35-121, the learned authors also note that:

> … [A question arises as to] whether it is for the claimant to allege [in a tort claim], that the defendant's conduct is actionable under the *lex loci delicti*, i.e. that such an allegation is part of the claimant's positive case, or whether it is sufficient for the claimant to allege what amounts to defamation [and other torts to which the Rome II Regulation does not apply] in English law, it then being left to the defendant to allege and prove that his conduct was not actionable under the *lex loci delicti*... ***If the first view is correct, it does not follow that the claimant has to allege and prove foreign law for he can rely on the principle that in the absence of an averment as to the content of foreign law, the court will apply English law. On the other hand, if the second view is correct, the content of the foreign law is irrelevant unless and until the defendant alleges that his conduct is not actionable under the*** **lex loci delicti** ***, and in support of that allegation, seeks to rely on the foreign law.*** The cases reveal support for each of these views and the question has not been authoritatively determined by an English court. ...
>
> [emphasis added in bold italics]

60 In Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2010) at para 6.01, the learned author also states that under English law, the pleading of foreign law is "generally voluntary", and parties are "likely to plead foreign law only where English law offers no equivalent claim or defence; or where foreign law is significantly more advantageous than English law; or where the pleading of foreign law is mandatory" (see also James McComish in "Pleading and Proving Foreign Law in Australia" (2007) Melb U L Rev 400).

61 In this case, the parties did not plead or raise any issue of foreign law in relation to the claim of unlawful means conspiracy (for example, to argue that the claim was not actionable under Taiwan law or that there was a defence under Taiwan law that the respondent could avail itself of) (the Judgment at [80]). In a tortious claim involving foreign elements, the claimant is not obliged to plead the applicability of foreign law, and in our judgment, there is no reason or basis for imposing any such burden on the plaintiff (see also Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998) ("*Foreign Law in English Courts*") at pp 101–103 who notes that the view that a claimant must plead actionability under the *lex loci delicti*, having decided to sue in England and have English law apply, is hard to justify either on authority or principle). In our judgment, the primary rationale for the double actionability rule in general lies in the consideration

that an alleged tortfeasor who commits an act or omission in one jurisdiction should not be liable to suit in another without being afforded the opportunity to contend that for one reason or another, whether it be the lack of such a head of liability or the availability of a defence in the place where the alleged tort was committed, he would not have been liable there and so should not be liable in the forum (see also *Halsbury's Singapore* at para 75.372). This explains why the rule exists primarily for the benefit of the defendant, whose burden it should be to raise the issue and prove the difference. Where, as here, he does not raise any difference in the law of the place of the tort, there is accordingly no conflict of laws issue raised by the parties, and the court simply applies the forum's law (see also, *GCT* at [87]–[89]).

62 In the circumstances that availed in this case, the Judge ought simply to have applied Singapore law. The Judge should have assessed the claim purely as a domestic matter governed by Singapore law, which is how the case was pleaded. It follows that in our judgment, the Judge erred in dismissing the Suit on the basis of the appellants' failure to plead actionability under Taiwan law.

63 The Judge distinguished *GCT* on the basis that it involved the choice of law rule for a claim for defamation and not unlawful means conspiracy. However, it does not seem to us that this distinction featured materially in the reasoning of the court in *GCT.* Nor do we think that there is any basis in principle for confining the rule to actions in defamation. It also follows from this that there was no need, on the facts of this case, to consider the applicability of the presumption of similarity or identity of laws (*ie*, the presumption that foreign law is the same as the *lex fori* in absence of proof) which is concerned with the ascertainment of the content of foreign law. In *Law, Foreign Laws and Facts* at p 406, the learned author in discussing the presumption of similarity or identity of laws observed that:

> ... the presumption of identity between English and foreign law has always been troublesome. Even if it operates where proof of foreign law has failed, or has not been attempted, ***it is uncertain whether it has a role where foreign law has not been pleaded at all.*** ... [emphasis added in bold italics]

64 We note that in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 201 ("*OMG Holdings*") at [39] and [42], the court appeared to require the parties to plead foreign law in relation to a claim in passing off, and noted that the presumption that the foreign law is the same as the *lex fori* would not apply if an injunction is sought to restrain acts of passing off committed in the foreign jurisdiction. The court in *OMG Holdings* relied on a series of cases where the courts refused injunctions to restrain alleged acts of passing-off in other jurisdictions on the basis that evidence on foreign law had not been adduced and the claim was not shown to be actionable in the foreign jurisdiction. We do not think that *OMG Holdings* or the cases relied upon by the court (such as *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 ("*Alfred Dunhill*")) are of assistance to the appellants (see also, *Foreign Law in English Courts* at p 103). *Alfred Dunhill* may have to be seen in light of the nature of the application sought, which was an interlocutory injunction to restrain acts of passing off in another jurisdiction. In such circumstances, it would not be surprising if the court were to require proof that the act to be restrained is in fact illegal in the place where it would otherwise be done.

65 Consequently, it is not necessary for us to make any order on the Summons, and we order that the parties bear their own costs in respect of the Summons. However, although we agree that Judge erred insofar as she dismissed the claim in this ground, this does not dispose of the appeal and we now turn to consider whether the elements of the tort of unlawful means conspiracy were made out on the facts, as a matter of Singapore law.

Issue 3: Whether the elements of the tort of unlawful means conspiracy are satisfied on the

facts of this case

66 The nub of the appeal on the substantive question of the tort of unlawful means conspiracy turned on the mental element that would support a finding of liability on the part of the respondents. Mr Yeo accepted that Ms Lim had no actual knowledge of Mr Qin at the time the Documents were shown, nor of the representations made by Mr Chiao and Mr Hsiao on 24 June 2008, nor even of the fact that EIMC had found a potential investor who would provide it with funds. After all, the fraud on the appellants was not to raise funds *in order to pay for the Hulls*, which had always been the extent of the respondents' interest. On the contrary, Mr Qin was told that the Hulls had already been purchased and paid for and then sold, and that EIMC had purchased other vessels, which were currently under construction, with the sale proceeds (see above, at [26]). Mr Qin decided to invest in the company because he thought that it was a good business proposition.

67 However, Mr Yeo's case was that the appellants were part of the class of persons who stood to be injured by the wrongful acts of the respondents because it would have been within the contemplation of Ms Lim, as a business person, that EIMC might approach not just banks but investors to inject money into EIMC whether by way of loan or equity. Mr Yeo also submitted that the mental element for unlawful means conspiracy would be satisfied if the respondents knew or ought to have known that the Documents which had been created with their participation, *could* be used for other fraudulent purposes by Mr Lu, Mr Hsiao or the principals of EIMC to deceive private investors other than banks into investing in EIMC on the basis of the false impression of EIMC's financial strength, but were recklessly indifferent as to whether this would transpire. During the hearing of this appeal, we expressed the concern that if we accepted Mr Yeo's conception of the mental element for unlawful means conspiracy, the tort of conspiracy would begin to look very much like a species of negligence.

68 In addressing this issue, it might be useful for us to first examine the history of the tort of unlawful means conspiracy and the developments that have taken place thus far, with particular attention paid to developments that have taken place in England.

History of the tort of conspiracy by unlawful means

69 Hazel Carty, in her article, "The economic torts in the 21st century" (2008) 124 LQR 641 ("*Carty LQR*") sets out a succinct summary of the history and evolution of the law on unlawful means conspiracy in England (and indeed, the group of torts commonly labelled as "economic torts") before the decision of *OBG Ltd and another v Allan and others* [2008] 1 AC 1 ("*OBG*") (at p 164):

> In theory the House of Lords' decision in *Allen v Flood* set out the framework for the modern development of the economic torts. However, the century following that seminal decision saw the economic torts get into a muddle. By the start of the 21st century a patchwork list of economic torts--with confusing intersections between them--had emerged. So inducing breach of contract had spawned torts of direct and indirect interference with contract. A tort of intimidation had also been identified, together with what was described as the "genus" tort of unlawful interference with trade (now termed the tort of causing loss by unlawful means). In addition a hybrid tort, unlawful interference with contractual relations, lurked in case law, thought to lie somewhere between the tort of inducing breach and the tort of causing loss by unlawful means. The case law also evidenced two further economic torts. They were both based on conspiracy; but whereas the first focused on unjustified harm, the other centred on unlawful means, and their relationship to the other economic torts (and to each other) was uncertain.
>
> Moreover the ingredients of these torts lacked clarity. Though inducing breach of contract

required knowledge of the contract breached and the tort of causing loss by unlawful means and the unlawful means conspiracy tort centred on the use of unlawful means, these key ingredients had failed to attract a uniform judicial definition. And the requirement of intentional harm--the key ingredient of all the economic torts--was similarly unclear.

70 It is noteworthy that most leading textbooks on the subject have categorised conspiracy claims in tort as part of a cluster of economic torts (see for example, Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2011) ("*The Law of Torts in Singapore*"); *Clerk & Lindsell on Torts* (Sweet & Maxwell, 20th Ed, 2010) ("*Clerk & Lindsell*") at para 24-01; Francis Trindade, Peter Cane & Mark Lunney, *The Law of Torts in Australia* (Oxford University Press, 4th Ed, 2007) ("*The Law of Torts in Australia*"); Peter T Burns and Joost Bloom, *Economic Interests in Canadian Tort Law* (LexisNexis, 2009)), alongside the tort of procuring a breach of contract, unlawful interference and intimidation. This perspective seems to have spawned the search for a unifying theory of economic torts which was eventually rejected in the United Kingdom in *OBG*; but this in turn has since been somewhat obscured by the more recent pronouncement of the House of Lords in *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 ("*Total Network*") (see Hazel Carty, *An Analysis of the Economic Torts* (Oxford University Press, 2nd Ed, 2010) ("*Carty*") at pp 166–168).

71 At least a few propositions seem clear. The first is that there appears to be two types of settings in which such torts might arise. The first has been termed the "3-party setting" which envisages the involvement of a third party or intermediary either as the primary wrongdoer (*eg*, the intermediary who actually breaches the contract in the tort of inducement of breach of contract, as was laid down in *Lumley v Gye* [1843] EWHC QB J73) or as the victim of the wrongful act of the defendant (*eg*, in the tort of unlawful interference with business—also known as the tort of causing loss by unlawful means—such as where a defendant intends to injure the claimant by wrongful interference with a third party's actions) (see generally, *Carty* at pp 17–18 and pp 155–156; *OBG* at [46]–[47]). However, liability can also arise in a "2-party setting" where the defendant intentionally causes loss to the claimant without acting through an intermediary. This can be seen in torts such as intimidation and conspiracy. Conspiracy, of course, could also arise in a "3-party setting": see Lord Mance in *Total Network* at [117] citing *Lonrho plc v Fayed and others* [1992] 1 AC 448 ("*Lonrho v Fayed HL*").

72 The second proposition is that many though not all of these torts require that there be some unlawful means or the presence of an element of unlawfulness (*The Law of Torts in Singapore* at para 15.004; see also *The Law of Tort* (Ken Oliphant gen ed) (LexisNexis, 2nd Ed, 2007) ("*Oliphant*") at para 29.6). This is unsurprising given that the common law has recognised the need to protect and encourage lawful competition in a free market system. Lord Nicholls of Birkenhead observed in *OBG* (at [142]) that:

> … Intentional harm of another's business is not of itself tortious. Competition between businesses regularly involves each business taking steps to promote itself at the expense of the other. One retail business may reduce its prices to customers with a view to diverting trade to itself and away from a competitor shop. Far from prohibiting such conduct, the common law seeks to encourage and protect it. The common law recognises the economic advantages of competition.

In fact, it has been suggested that neither malicious hindrance with another person's business nor general "unfairness" renders conduct that is otherwise lawful, unlawful (*Oliphant* at para 29.2).

73 One notable exception to this was the tort of "conspiracy to injure" or what is now known as "lawful means conspiracy", where liability can arise merely by reason of damage flowing from a combination regarded as illegitimate because it had, at its essence, the predominant purpose of

injuring the claimant, "without proof of further illegality" (*Clerk & Lindsell* at para 24-07). In *Crofter Hand Woven Harris Tweed Company, Limited, and others v Veitch and Another* [1942] AC 435 at 462, Lord Wright said:

> … The rule may seem anomalous, so far as it holds that conduct by two may be actionable if it causes damage, whereas the same conduct done by one, causing the same damage, would give no redress. In effect the plaintiff's right is that he should not be damnified by a conspiracy to injure him, and it is in the fact of the conspiracy that the unlawfulness resides. It is a different matter if the conspiracy is to do acts in themselves wrongful, such as to deceive or defraud, to commit violence, or to conduct a strike or lock-out by means of conduct prohibited by the Conspiracy and Protection of Property Act 1875, or which contravenes the Trade Disputes and Trade Unions Act 1927. …

74 The tort of lawful means conspiracy has been castigated as an anomaly which has been allowed to survive only because of its vintage. The attempt to justify its existence rested largely on the much-criticised rationale that "a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may shew that the object is simply to do harm, and not to exercise one's own just rights" (*The Mogul Steamship Company, Limited v McGregor, Gow, & Co, and Others* [1889] 23 QBD 598 at 616). As long ago as thirty years, Lord Diplock in *Lonrho Ltd and another v Shell Petroleum Co Ltd and another (No 2)* [1982] 1 AC 173 ("*Lonrho v Shell*") noted the deficiencies in this rationale (at 189) in these terms:

> But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II. The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today. …

75 Notably, two decades later, Lai Kew Chai J in *Panatron Pte Ltd v Lee Cheow Lee and Others* [2000] SGHC 209 picked this theme up and suggested that the time had come to reconsider the law's historical recognition of the tort of conspiracy by lawful means (at [85]):

> … it is quite odd to have a situation where what a person does alone is not unlawful but it becomes actionable if he acts in concert with another. It is especially so in view of the fact that in this modern age, conglomerates are certainly more powerful and potent than the combination of a small group of people. Should our jurisprudence entertain this 'anomalous' cause of action? There are other pragmatic reasons for its discontinuance. It will obviate wasteful litigation, which tend to be highly contentious, prolonged and lend themselves to an investigation of a host of circumstantial evidence. That is because combines usually are hatched in secrecy and a plaintiff has to resort to indirect evidence and in the process of drawing conclusions from a set of circumstances there could arise fevered imaginations coloured by the inevitable emotions. Further, our law of tort already recognises other economic torts of intimidation, unlawful interference and indirect procurement of breach of, or interference with, contract which are sufficient to provide the necessary remedies. …

76 Another exception to the general applicability of the second proposition to this cluster of torts

is the tort of interference with a contractual relationship, short of inducing a breach of it (see Lord Hoffmann's discussion of *Quinn v Leathem* [1901] 1 AC 495 ("*Quinn*"); *GWK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 376 and *DC Thomson & Co Ld v Deakin* [1952] 1 Ch 646 ("*DC Thomson*") in *OBG* at [15]–[29]). The foundation for a unified theory which treated the tort of inducing a breach of contract ("*the Lumley v Gye* tort") as a species of the tort of actionable interference with contractual rights which extended to forms of interference other than persuasion, procurement or inducement was laid down by Jenkins LJ in *DC Thomson* (*OBG* per Lord Hoffmann at [26]–[27]). Subsequently, in *Torquay Hotel Co Ltd v Cousins and Others* [1969] 2 Ch 106 at 138, Lord Denning said "[t]he time has come when the [*Lumley v Gye* tort] should be further extended to cover 'deliberate and direct interference with the execution of a contract without that causing any breach'", including cases where the defendant prevents or hinders the intermediary from performing the contract. This extension of the *Lumley v Gye* tort was endorsed by Lord Diplock in *Merkur Island Shipping Corporation v Laughton (The Hoegh Anapa) and others* [1983] 2 AC 570 at 608. Today, the notion that these two torts are subsumed one within the other has been curtailed, if not jettisoned, following the House of Lords' decision in *OBG*. The House of Lords in *OBG* held that the *Lumley v Gye* tort and the tort of causing loss by unlawful means should be kept as distinct torts because the rationale underlying each of these two torts is different (*OBG* per Lord Hoffmann at [32]–[33] and [38]; see also *OBG* per Lord Nicholls at [188]–[189]; per Lord Walker of Gestingthorpe at [264]; per Baroness Hale of Richmond at [303]; and per Lord Brown of Eaton-under-Heywood at [319]–[320]). As explained in *Carty* at p 24, the *Lumley v Gye* tort depended "on the third party's liability for contract breach, resulting from the defendant's persuasion" and is a species of secondary liability, while the tort of causing loss by unlawful means was ambivalent as to the nature of the interest which is damaged, and is a species of primary liability (see also *OBG* per Lord Hoffmann at [32]–[33]). The House of Lords accordingly rejected the notion of a unified theory that underlay the *Lumley v Gye* tort and the tort of causing loss by unlawful means.

77 A third proposition that may be gleaned from the authorities is that these torts require some element of "intention" or "intentional harm" for liability to be imposed (*Carty* at p 170; *The Law of Torts in Australia* at pp 269–270), and that other, lesser, mental states would not suffice. In fact, it was thought in many cases that it was the element of *intentional* infliction of harm that might form the basis of a unified theory, although this premise too has been criticised (see *Carty* at p 19). Lord Lindley in *Quinn* characterised the *Lumley v Gye* tort as a species of the tort of causing loss by lawful means, on the basis of a wider principle which imposed liability for "all wrongful acts done intentionally to damage a particular individual and actually damaging him" (*Quinn* at 535; see also *Carty LQR* at p 645). This placed emphasis on the subjective intent of *causing harm* coupled with the objective fact of *resulting harm* to justify making unlawful that which would otherwise be lawful.

78 Beyond this, not much else was clear. Was the scope of the required intention the same for all torts? Was there even a unifying theory? Was it possible to follow in the footsteps of Lord Atkin whose historic judgment in *M'Alister (or Donoghue) (Pauper) v Stevenson* [1932] 1 AC 562 paved the way for the development of a unified theory of liability for *unintended* physical harm caused by a failure to take reasonable care to avoid foreseeable risks of injury, in the field of *intentional* acts done with the aim of causing economic harm (usually carried out in a commercial context)? Were each of these torts all still valid and relevant (see, for example, the forgoing discussions on unlawful interference with contractual relations falling short of breach and on lawful means conspiracy)? There have also been questions as to whether there remains a basis or a need for a separate tort of unlawful means conspiracy in a "2-party setting" where the same question of liability could be analysed and resolved by reference to the framework applicable to the primary tort accompanied by the doctrine of joint tortfeasorship (see *Carty LQR* at p 669).

Position in England today in relation to economic torts

OBG

79 Some of these questions might be thought to have been settled, in England at least, by the House of Lords' decision in *OBG*. *OBG* was hailed as endorsing a "back to basics" approach with a return to the true import of economic torts and an accompanying abstentionist judicial philosophy exemplified in *Thomas Francis Allen v William Cridge Flood and Walter Taylor* [1898] 1 AC 1 (more commonly known as *Allen v Flood*) (*Carty* at pp 24–25). In *OBG*, the House of Lords concluded that there is no unified theory for the cluster of torts grouped under the label of "economic torts" (see, for example, Lord Walker in *OBG* at [264]). *OBG* did not deal squarely with the question of unlawful means conspiracy. But it dealt with a number of other torts, including the *Lumley v Gye* tort and the tort of causing loss by unlawful means. Indeed, the court's views on the lack of a unified theory underlying "economic torts" are illuminating. Lord Hoffmann, in particular, (at [32]) associated himself with the views of Peter Cane who said in "Mens Rea in Tort Law" (2000) 20 Oxford JLS 533 (at 552) that:

> The search for 'general principles of liability' based on types of conduct is at best a waste of time, and at worst a potential source of serious confusion; and the broader the principle, the more is this so. Tort law is a complex interaction between protected interests, sanctioned conduct, and sanctions; and although there are what might be called 'principles of tort liability', by and large, they are not very 'general'. More importantly, they cannot be stated solely in terms of the sorts of conduct which will attract tort liability. Each principle must refer, as well, to some interest protected by tort law and some sanction provided by tort law.

80 The House of Lords in *OBG* also agreed that the element of intention is a requirement across the spectrum of the various economic torts, even though the precise scope and content of that element of intention that had to be made out for liability to be imposed for each tort might be different depending on the rationale and interest underlying each individual tort (*OBG* per Lord Hoffmann at [62]; per Lord Nicholls at [164]–[167]). The notion of a unifying theory having been jettisoned, it becomes essential for the court to be sensitive to the different justifications and conceptual underpinnings for each tort and to guard against importing notions and ideas from the analytical framework applicable to one tort into that for another as if there were a unifying theory. A philosophical division in the House of Lords as to the underlying rationale for the tort of causing loss by unlawful means in a "3-party setting" (which might have implications on the development of other economic torts) translated into divergent views on what would constitute the requisite "unlawful means". The genesis for the philosophical division is encapsulated in Lord Nicholls' speech in *OBG* at [153]–[155]:

> These different views are founded on different perceptions of the rationale underlying the unlawful interference tort. *On the wider interpretation of "unlawful means" the rationale is that by this tort the law seeks to curb clearly excessive conduct.* The law seeks to provide a remedy for intentional economic harm caused by unacceptable means. The law regards all unlawful means as unacceptable in this context.
>
> On the narrower interpretation this tort has a much more limited role. On this interpretation the function of the tort of unlawful interference is a modest one. Its function is to provide a claimant with a remedy where intentional harm is inflicted indirectly as distinct from directly. If a defendant intentionally harms a claimant directly by committing an actionable wrong against him, the usual remedies are available to the claimant. The unlawful interference tort affords a claimant a like remedy if the defendant intentionally damages him by committing an actionable wrong against a third party. The defendant's civil liability is expanded thus far, but no further, in respect of damage intentionally caused by his conduct.

In my view the former is the true rationale of this tort. The second interpretation represents a radical departure from the purpose for which this tort has been developed. If adopted, this interpretation would bring about an unjustified and unfortunate curtailment of the scope of this tort.

[emphasis added]

81 Lord Hoffmann, whose views on this issue represented those of the majority, thought that the tort was meant to "enforce basic standards of civilised behaviour in economic competition, between traders or between employers and labour" (in *OBG* at [56]). However he felt that this was subject to the significant limitation that the "unlawful means" be limited to civil wrongs for which the intermediary could maintain an action (per Lord Hoffmann at [49]; per Baroness Hale at [302]; and per Lord Brown at [320]). The key question was whether the use of any means that entailed the happenstance of some law or regulation being breached would suffice to constitute "unlawful means" even if the breach in question did not translate into or give rise to a civil right of action on the part of the third party, and even if did not affect the third party's freedom to deal as he pleased with the plaintiff. Lord Hoffmann thought not in *OBG* at [51]:

Unlawful means therefore consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause loss to the claimant. It does not in my opinion include acts which may be unlawful against a third party but which do not affect his freedom to deal with the claimant.

[emphasis added]

82 Lord Hoffmann emphasised that "the court should be similarly cautious in extending a tort which was designed only to enforce basic standards of civilised behaviour in economic competition", "[o]therwise there [would be] a danger that it will provide a cause of action based on acts which are wrongful only in the irrelevant sense that a third party has a right to complain if he chooses to do so" (*OBG* at [56]). Lord Hoffmann was doubtful as to whether the requirement of a causal connection between the wrongful conduct of the defendant and the loss suffered by the plaintiff would be a sufficient limiting factor for the imposition of liability (*OBG* at [58]). In arriving at the view that the unlawful means must in general be actionable by the third party, Lord Hoffmann referred to *Lonrho v Shell* as an illustration of a failed attempt to found a cause of action on the fact that the conduct alleged to have caused loss was contrary to law but not actionable by the third party (*OBG* at [55]). It is true that on the facts of *Lonrho v Shell* the wrongful conduct in question there, an alleged breach of a sanctions order that attracted penal consequences, was not actionable as a civil wrong. However, it should be noted, as was observed in *Total Network*, (see, for example, per Lord Hope at [38]) that this did not appear to be the basis of Lord Diplock's reasoning in *Lonrho v Shell* since his real preoccupation was with the failure to show the requisite intention to injure.

83 Unlike Lord Hoffman's more measured approach, Lord Nicholls in *OBG* considered that "unlawful means" encompassed "all acts which a person is not permitted to do" and "covers common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations, breaches of confidence, and so on" (*OBG* at [151]). While acknowledging that the element of unlawful means served as a limitation on the boundaries of liability (*OBG* at [147]), he preferred a broader concept of "unlawful means" of illegality with the brake of "instrumentality" (*OBG* at [159]) and see below at [93]. Lord Nicholls (at [152]) also thought it:

… very odd if in such a case the law were to afford the claimant a remedy where the defendant committed or threatened to commit a tort or breach of contract against the third party but not if

he committed or threatened to commit a crime against him.

84 Lord Walker took a more tentative view. While noting the divergent views of Lord Hoffmann and Lord Nicholls on the issue of "unlawful means", he said as follows (in *OBG* at [269]–[270]):

> Faced with these alternative views I am naturally hesitant. I would respectfully suggest that neither is likely to be the last word on this difficult and important area of the law. The test of instrumentality does not fit happily with cases like *RCA Corpn v Pollard*, since there is no doubt that the bootlegger's acts were the direct cause of the plaintiff's economic loss. The control mechanism must be found, it seems to me, in the nature of the disruption caused, as between the third party and the claimant, by the defendant's wrong (and not in the closeness of the causal connection between the defendant's wrong and the claimant's loss).
>
> I do not, for my part, see Lord Hoffmann's proposed test as a narrow or rigid one. On the contrary, that test (set out in para 51 of his opinion) of whether the defendant's wrong interferes with the freedom of a third party to deal with the claimant, if taken out of context, might be regarded as so flexible as to be of limited utility. But in practice it does not lack context. The authorities demonstrate its application in relation to a wide variety of economic relationships. I would favour a fairly cautious incremental approach to its extension to any category not found in the existing authorities.

85 Certain aspects of *OBG* do not arise for our consideration in this matter, not least because the case before us arises in a "2-party setting". But *OBG* is helpful in demonstrating that it is not possible, at present, to discern a unified theory of economic torts. It follows from this that terms and concepts which are applied in various of these torts such as "unlawful means" or "intention" might not have identical meanings across the range of these torts, even if it is recognised that in general, they all stand on a requirement of "intention". In each case it will be necessary to define the scope or meaning of the relevant elements having regard to the rationale underlying the particular tort in question and also the similarities and differences between them.

Total Network

86 As noted earlier (see above, at [79]), the tort of unlawful means conspiracy was not discussed in detail in *OBG*. In fact, the import of *OBG* on torts falling within the "2-party setting" remained unclear (*Carty* at p 26), until the decision of the House of Lords in *Total Network*. On one view, the House of Lords in *OBG* had been primarily concerned with torts within the "3-party setting" and had only presented a "partial analysis of the economic torts" (*Carty* at p 26). Lord Nicholls had commented in *OBG* that he was "far from satisfied that, in a two-party situation, the courts would decline to give relief to a claimant whose economic interests had been deliberately injured by a crime committed against him by the defendant" (*OBG* at [161]), while Lord Hoffmann had qualified the applicability of his views on "unlawful means" to the situation of "two-party intimidation" which he said raised "altogether different issues" (*OBG* at [61]).

87 In the subsequent decision of *Total Network*, however, the House of Lords had the occasion to address the tort of unlawful means conspiracy. The House of Lords in *Total Network*, in line with the *dicta* of Lord Nicholls and Lord Hoffmann (mentioned in the preceding paragraph) held that *OBG* and its enunciation of what constituted "unlawful means" was limited to the "3-party setting" and did not extend to unlawful means conspiracy (*Total Network* per Lord Hope of Craighead at [43]; per Lord Walker at [99]; per Lord Mance at [124]; per Lord Neuberger of Abbotsbury at [223]; see also *Carty* at pp 26–27). Having found no clear and persuasive authority to the contrary, the House of Lords decided that criminal conduct at common law that was engaged in as a means of inflicting harm on

the claimant could constitute "unlawful means", whether or not such conduct would be actionable by the claimant against one or more of the co-conspirators. The criminal means in question had to be the very means by which harm was inflicted on the claimant or it had to be directed or targeted at the claimant (*Total Network* per Lord Hope at [44]–[45]; per Lord Scott of Foscote at [56]; per Lord Walker at [94]–[95]; per Lord Mance at [116]; per Lord Neuberger at [221] and [224]). It followed that it was not necessarily or always the case that *any* criminal conduct would give rise to a cause of action for unlawful means conspiracy (see for example, Lord Mance at [119]), and the law had to be developed incrementally (see Lord Walker at [96]).

88 The House of Lords rejected the notion advanced by some academics that the tort of unlawful means conspiracy was a form of secondary liability or a barren iteration of joint tortfeasance (which would, consequently, require the unlawful means to be actionable in itself as a civil wrong) (Lord Walker at [66] and [100]–[102]; Lord Mance at [116]; Lord Neuberger at [225]). Lord Neuberger noted that "although [this] involve[d] an element of pulling oneself up by one's own bootstraps" (at [225]), *Total Network* was a case in which the tort of unlawful means conspiracy was necessary in order to fill the lacuna that would otherwise exist because the claimant in that case (at least on the basis of the cases put forth by the parties) could not have succeeded in a claim for lawful means conspiracy or by tagging on a claim of joint tortfeasorship to some other primary liability or for the tort of causing loss by unlawful means. Various other justifications were advanced as warranting the recognition of this tort by reference to a wide ambit of "unlawful means". As noted in *Carty* at pp 134–135:

> This retreat to first principles and the width to be ascribed to unlawful means in this tort was based on a number of justifications … [t]he first three such justifications look rather limp: an instinctive view based on the man in the street[;] that it was 'too obvious to need discussion'[;] that crimes, being 'highly blameworthy' should constitute unlawful means for this tort; considerations of policy-driven justice; acknowledgement of its existence by the defendants (so it should be given a reason to exist).
>
> … [on the fourth justification, *viz*, considerations of policy-driven justice]… it was the presence of the conspiracy to do harm that was stressed throughout the judgments—Lords Hope and Walker citing Lord Wright in *Crofter* that it was 'in the fact of conspiracy that the unlawfulness resides'. In part this focus on the element of combination was due to the fact that, according to Lord Neuberger, the common law took a particularly 'censorious view where conspiracy is involved'. This also meant, of course, that the validity of lawful means conspiracy was accepted, with indeed the House of Lords concluding that if a predominant 'improper' purpose can be sufficient for liability in the lawful means conspiracy tort, 'it would be anomalous' if unlawful means conspiracy did not attach to crimes. However the importance of conspiracy was not just as an ingredient in its own right but also because of what Lord Walker termed its 'intense' focus on intention, which 'sets conspiracy apart from other torts'. This justification was highlighted by Bowen LJ in *Mogul* when he stated 'the very fact of combination may show that the object is simply to do harm and not to exercise one's own just rights'. Lord Walker also referred to Lord Dunedin's observations in *Sorrell v Smith* that acting in concert to carry out an unlawful plan as in criminal conspiracies brings in the 'spirit of the criminal law where motive or intention—the mens rea—is everything'.

The law in Singapore in the light of the developments in England

89 Against this background of the development of the law in this area in England, we turn to consider the impact of *OBG* and *Total Network* on the law of unlawful means conspiracy in Singapore.

90 A preliminary question is whether unlawful means conspiracy continues to have any relevance in our law as a basis of civil liability. Should we continue to recognise its existence, as well as that of lawful means conspiracy? We do not propose to answer that question in this appeal as it was not argued, but a future case might well present the opportunity for this to be carefully considered. Parenthetically, we note, on the facts of this case, that the attempt to shoehorn the claim against the respondents as one based on unlawful means conspiracy might have been avoided since the action could instead have been pleaded on the basis of joint tortfeasorship in deceit (though we should state at the outset that the prospects of success in such a claim seems to be equally parlous on the facts, for reasons we will discuss below). For the purposes of this appeal, we will assess the claim by reference to the analytical framework developed and applied in relation to the tort of unlawful means conspiracy as it stands.

91 A second question that might arise is whether we ought to follow the House of Lords' rejection in *Total Network* of the notion that "unlawful means" are confined to actionable civil wrongs of the kind enunciated by the majority in *OBG*. We do not need to reach a conclusion on this since there was no dispute over the element of unlawfulness in this case. Having said that, we do make the observation that we find much force in the view that unlawful means for the purposes of unlawful means conspiracy ought not to be so limited. In *Beckkett Pte Ltd v Deutsche Bank AG and another and another appeal* [2009] 3 SLR(R) 452 ("*Beckkett*") at [120], Chan Sek Keong CJ, relying on *Total Network*, noted that the element of unlawfulness in unlawful means conspiracy "covers both a criminal act or means, as well as an intentional act that is tortious" (though, it should be noted that the scope of "unlawful means" was not a contested issue in that case).

92 A more difficult question concerns the limits that the law should draw in imposing liability for unlawful means conspiracy based on criminal conduct. Even on the authority of *Total Network*, it is unclear where this line ought to be drawn. Lord Mance in that case said at [119]:

> Caution is nonetheless necessary about the scope of the tort of conspiracy by unlawful means. Not every criminal act committed in order to injure can or should give rise to tortious liability to the person injured, even where the element of conspiracy is present. The pizza delivery business which obtains more custom, to the detriment of its competitors, because it instructs its drivers to ignore speed limits and jump red lights (Lord Walker in *OBG Ltd v Allan* [2008] 1 AC 1, para 266) should not be liable, even if the claim be put as a claim in conspiracy involving its drivers and directors. And--as in relation to the tort of causing loss by unlawful means inflicted on a third party--there is a legitimate objection to making liability "depend upon whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant": per Lord Hoffmann in *OBG Ltd v Allan*…

Hazel Carty (in *Carty* at p 135) has criticised *Total Network* as laying down "vague criteria" for the types of criminal conduct that would be sufficient, ranging from whether the offence existed to protect a victim such as the claimant (*Total Network* per Lord Mance at [120]), whether a tort for breach of statutory duty would similarly be available (*Total Network* per Lord Walker at [96]), to whether injury to the claimant was a direct, inevitable and foreseeable result of the conspiracy succeeding (*Total Network* per Lord Neuberger at [223]–[224]).

93 Again, it is not necessary for the purposes of this appeal for us to express a definitive view on this. We venture to suggest, however, that the example of the pizza delivery or courier delivery business might be more easily resolved through the test of "instrumentality" propounded by Lord Nicholls in *OBG*. If two pizza delivery companies agree to purposefully violate parking regulations and instruct their drivers to park their vehicles across the car park entrance of a third competitor in order to injure the third competitor's business, it is difficult to see how that could not amount to an

unlawful means conspiracy. This can readily be distinguished from the case of a pizza delivery company that instructs its drivers to drive at excessive speeds in order to reduce delivery times. The interest implicated in the latter situation is road safety; in the former, it is the third competitor's interest to be free from targeted unlawful interference in its activities. To this extent, we agree with Lord Nicholls' observations in *OBG* at [160] that the pizza delivery companies' criminal conduct in the latter case is "not an offence committed against the rival company in any realistic sense of that expression". Imposing the requirement of "instrumentality" would also address the concern expressed by the House of Lords in *Total Network* that an anomaly would arise if a remedy was allowed where the wrongful conduct was a tort but not where it happened to entail the commission of a crime (*Total Network* per Lord Mance at [118]; per Lord Neuberger at [221]). In our judgment, the focus should be on the intention pursuant to which the unlawful act was done. This also seems to tie in consistently with our analysis on the question of intention in the following paragraphs. We emphasise, however, that this issue may warrant further argument, analysis and consideration in a future case.

94 A fourth issue that arises is whether the core element of unlawfulness in unlawful means conspiracy (and indeed the rationale underpinning the tort) resides in the fact of the combination between the parties. This appeared to feature in their Lordships' consideration in *Total Network* that "unlawful means" extended beyond what was civilly actionable by the claimant (see above, at [88]). Lord Hope said in *Total Network* at [44] that:

> … If, as Lord Wright said in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, 462, it is in the fact of the conspiracy that the unlawfulness resides, why should that principle not apply here? As a subspecies of the tort of unlawful means conspiracy, the case is virtually indistinguishable from the tort of conspiracy to injure. The fact that the unlawful means were not in themselves actionable does not seem, in this context at least, to be significant. …

Similar views were also echoed by the other members of the House of Lords in *Total Network* (see above, at [87]). To the extent it is suggested that unlawfulness consists in the fact of the agreement *per se*, we do not think this is correct.

95 Undoubtedly, as it stands, the conspiracy torts rest on the fact of an agreement or combination. But the real wrong rests in the notion that something is done *in order to harm another person*. Eveleigh LJ in *Lonrho Ltd & Another v Shell Petroleum Co Ltd & Another*, The Times 7 March 1981 Transcript No 51 of 1981 ("*Lonrho v Shell (No 2) CA*") articulated the premise for the tort of conspiracy as "[consisting] of the agreement of two or more persons to act in combination in order to injure the plaintiff without justification, and where in pursuance of that object something is done whereby the plaintiff suffers damage". He went on to observe that where the combination is done without the use of "unlawful means", it could be justified if the predominant object of the combination was not the causing of harm but, for example, the furtherance of self-protection or advancement of the personal interests of the defendant.

96 What is proscribed by the tort of *lawful* means conspiracy is the malicious combination to harm someone by means falling within the letter of the law. This might be understandable because judges see laws as designed to prevent harm and rail against targeted efforts to sail so close to the wind as to stay within the letter of the law while setting out to harm another. Nonetheless, where self-interest is the predominant motivation, the act may be justified. However, if the means are *unlawful*, there is no scope for such justification as a means of avoiding liability. This is the crux of unlawful means conspiracy—one cannot combine and undertake an unlawful course of action with the intention to harm another even if the principal "motive" is to benefit oneself. *It is the combination, accompanied by the intention to injure by unlawful means that makes such conduct unlawful*. Each of these elements is important. Thus, Fox LJ observed in *Lonrho v Shell (No 2) CA* that a focus on the

combination to commit a wrong would be erroneous without also looking at the injury being the *purpose* rather than the *consequence* of the combination. Fox LJ also said:

> I agree with the judge, that where persons combine to do an unlawful act with the intention of injuring another person there is every reason why that person should have a cause of action if he suffers damage. The position is otherwise if, there being no cause of action in respect of the act if done by an individual, there was no intent by the combiners to injure the complainant. To give such a cause of action gives undue weight to the mere fact of the combination. An intention to injure is, it seems to me, a necessary element in the tort.

97 This is also in line with *Lonrho v Fayed HL*. There, the House of Lords addressed the confusion arising from Lord Diplock's speech in *Lonrho v Shell* at 189 in which he appeared to hold that a predominant intention to injure was required even for unlawful means conspiracy. The House of Lords clarified that if injury is caused intentionally by way of unlawful means, then the fact that the predominant intention was not to injure the claimant but to further one's own interest would not warrant a contrary conclusion. Lord Bridge in *Lonrho v Fayed HL* said at 465–466:

> … Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful.

98 The House of Lords in *Total Network* upheld the requirement for an *intention to injure* to be shown in a claim for unlawful means conspiracy, even though the articulation of the test for intention differed in the various speeches of the House of Lords (see Christian Witting, "Intra-corporate conspiracy: an intriguing prospect" (2013) 72 CLJ 178 at 187–188). We agree that the element of intention is essential. However, the difficulty is in the formulation of a test for "intention". The English Court of Appeal in *Douglas and others v Hello! Ltd and others (No 3)* [2006] 1 QB 125 ("*Hello!*") noted in the context of the tort of causing loss by unlawful means (for which the requisite mental element is the same as that for unlawful means conspiracy) that the authorities do not speak with one voice on what amounts to "intention to injure" (at [159]):

> There are a number of contenders for the test of the state of mind that amounts to an "intention to injure" in the context of the tort that we have described as "unlawful interference". These include the following: (a) an intention to cause economic harm to the claimant as an end in itself; (b) an intention to cause economic harm to the claimant because it is a necessary means of achieving some ulterior motive; (c) knowledge that the course of conduct undertaken will have the inevitable consequence of causing the claimant economic harm; (d) knowledge that the course of conduct will probably cause the claimant economic harm; (e) knowledge that the course of conduct undertaken may cause the claimant economic harm coupled with reckless indifference as to whether it does or not. A course of conduct undertaken with an intention that satisfies test (a) or (b) can be said to be "aimed", "directed", or "targeted" at the claimant. Causing the claimant economic harm will be a specific object of the conduct in question. A course of conduct which only satisfies test (c) cannot of itself be said to be so aimed, directed or targeted, because the economic harm, although inevitable, will be no more than an incidental consequence, at least from the defendant's perspective. None the less, the fact that the economic harm is inevitable (or even probable) may well be evidence to support a contention that test (b), or even test (a), is satisfied.

99 What is clear is that it is not sufficient for the claimant to show that it was reasonably foreseeable that the claimant would or might suffer damage as a result of the defendant's act. Lord Phillips of Worth Matravers MR who delivered the judgment on behalf of the Court of Appeal in *Hello!* emphasised that "there is an important conceptual and factual difference between a tort, like negligence or breach of duty, which requires merely that the loss or damage should be reasonably foreseeable and a tort, which requires actual knowledge (or subjective recklessness) as to the consequences" such as the tort of unlawful means conspiracy (*Hello!* at [160]).

100 We agree. The law has insisted on the element of "intention" for economic torts in recognition of "the need to keep liability within acceptable bounds" (*Carty* at p 302), particularly in the light of the effect that these torts have on competition and the boundaries of acceptable conduct in the marketplace (see also *The Law of Torts in Singapore* at para 15.004). The law recognises that intentionally damaging other persons, by unlawful means is not to be countenanced. In contrast, in the tort of negligence, liability is imposed for a failure to meet an objective standard of reasonable conduct, no matter the state of mind of the actor (*The Law of Torts in Australia* at p 15).

101 A claimant in an action for unlawful means conspiracy would have to show that the unlawful means and the conspiracy were targeted or directed at the claimant. It is not sufficient that harm to the claimant would be a likely, or probable or even inevitable consequence of the defendant's conduct. Injury to the claimant must have been intended as a means to an end or as an end in itself. As Lord Hoffmann said in *OBG* (at [42] and [62]):

> … It is necessary to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. ...
>
> …
>
> In the *Lumley v Gye* tort, there must be an intention to procure a breach of contract. In the unlawful means tort, there must be an intention to cause loss. The ends which must have been intended are different. … But the concept of intention is in both cases the same. In both cases it is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions.

Lesser states of mind, such as an appreciation that a course of conduct would inevitably harm the claimant, would not amount to an intention to injure, although it may be a factor supporting an inference of intention on the factual circumstances of the case. In *Lonrho plc v Fayed* [1990] 2 QB 479 at 488–489 Woolf LJ observed that the requisite intent (for the tort of causing loss by unlawful means) would be satisfied if the defendant fully appreciated that a course of conduct that he was embarking upon would have a particular consequence to a claimant but nonetheless decided to pursue that course of conduct; or if the defendant deliberately embarked upon a course of conduct while appreciating the probable consequences to the claimant. In our judgment, this is inconsistent with the requirement that intention must be shown. It is simply insufficient in seeking to meet the element of *intention* to show merely that there was knowledge to found an awareness of the likelihood of particular consequences.

Intention to injure a class of persons

102 We turn to a sub-issue which arose in the appeal, namely whether it is sufficient for a claimant to show that the defendant had the intention to injure a class of persons (of which the claimant was a member) as opposed to a more specific intention to injure the claimant. Before us, the appellants argued that they fell within the class of potential fund providers intended to be "defrauded" by the scheme perpetuated by the respondents, Mr Hsiao, Mr Lu and Mr Chiao. The appellants relied on *OCM Opportunities Fund II, LP and Others v Burhan Uray (alias Wong Ming Kiong) and Others* [2004] SGHC 115 ("*OCM Opportunities*") at [35], in which Belinda Ang Saw Ean J ("Belinda Ang J") observed that "it is not necessary to have an identifiable victim to show that the conduct was done with intention to injure that victim" for the purposes of unlawful means conspiracy. She held that it is sufficient that the claimant is a member of a class of persons that the conspirators intended to injure, even if his membership of the class is uncertain at the date of the agreement" (*OCM Opportunities* at [35] citing *Bullman and another v Berkeley Homes (Essex) Ltd and others* [2003] All ER (D) 132 (Apr) ("*Bullman*") at [108]). Belinda Ang J added, however, that if the conspiracy is aimed not at an individual or at a class of persons but at the public, the damage sustained by a member of the public would be too remote to give rise to a cause of action (*OCM Opportunities* at [36] citing *Vickery v Taylor* (1910) 11 SR (NSW) 119).

103 On a close reading of *Bullman*, we do not think that the case is clear authority for the proposition that liability can be imposed for unlawful means conspiracy so long as the claimant is a member of an indeterminate class of persons (and insofar as it does stand for this proposition, we think that the case ought to be approached with caution). The outcome in *Bullman* has to be seen in the light of its facts. The claimants ("the Bullmans") were directors of and owned 998 of 1000 shares in Pasec Group Limited ("Pasec"). Pasec owned a piece of land ("North Farm"). The second and third defendants ("the Thomases") claimed ownership by adverse possession of the ground floor of a garage built on one part of North Farm. Pasec did not object to the Thomases becoming registered proprietors over the ground floor of the garage, as long as it did not affect Pasec's ownership of the loft of the garage ("the Flying Freehold"). Plans were subsequently underway to sell a part of North Farm as a development site ("the Development Site") to the first defendant ("Berkeley"). The transaction to convey the Development Site to Berkeley was done through a company that the Bullmans incorporated for tax purposes ("NFDL"). A dispute arose as to whether the Flying Freehold had been included in the conveyance to Berkeley. The Thomases then entered into an agreement ("the Agreement") with Berkeley for the garage and the Flying Freehold to be demolished and reconstructed, and they deliberately excluded the Bullmans and Pasec from the negotiations even though Pasec was still the registered proprietor of the Flying Freehold (*Bullman* at [70]). The Thomases were also put on notice by the Bullmans' solicitors at the relevant time that the Bullmans or their companies were claiming to be owners of the disputed part of the land (*Bullman* at [55]). The Bullmans later became owners of the land on Pasec's and NFDL's liquidation, and sued the Thomases for conspiring to injure them by, among other things, entering into an agreement with Berkeley to allow them to demolish the garage, including the Flying Freehold.

104 In that context, Launcelot Henderson QC found that injury to Pasec and its successors in title was within the direct contemplation of Berkeley and the Thomases. Henderson QC seemed struck by the fact that the agreement between the Thomases and Berkeley contained clauses such as one indemnifying the Thomases against any suit by the owners of the Flying Freehold "from time to time". On the whole, the facts of *Bullman* can be seen to be exceptional because the contract expressly contemplated the possibility of a claim being brought by the successors-in-title of Pasec and the Bullmans themselves had in fact asserted such rights at the relevant time. In our judgment, the case is scant authority for any general principle that the intention to harm an indeterminate class of victims will suffice.

105 On the whole, the position in Australia appears to be that liability for unlawful means

conspiracy against a class of persons will only be imposed if the harm is *directed* at persons who are ascertainable at the time of the conspiracy (*The Law of Torts in Singapore* at para 15.062). In *Dresna Pty Ltd v Misu Nominees Pty Ltd and others* [2004] FCAFC 169 ("*Dresna*"), the appellant alleged that the respondents conspired to injure it by, among other things, making false representations to and breaching undertakings given to the Australian Competition and Consumer Commission ("ACCC") that the third and fourth respondents ("Franklins"), a supermarket retailer, would sell its business to an independent supermarket retailer and not to a large supermarket operator such as the fifth respondent ("Coles").

106 In *Dresna*, Mr Leo Blake ("Mr Blake") had entered into an agreement with Franklins in May 2001 to purchase its business in Mentone with the option of nominating a substitute purchaser. A short while later, in June 2001, the aforesaid undertakings were given to ACCC. Sometime in 2001 and in any event, by June 2001, Coles allegedly began to devise a scheme to acquire Franklins' assets, which Franklins had allegedly represented to the ACCC would be sold to an independent supermarket retailer. In August 2001, the appellant, which was Mr Blake's nominee, entered into an agreement to purchase Franklins' business at its Mentone store ("the Mentone BSA") but difficulties arose in obtaining the lessor's consent for the appellant to lease the premises. Between September and November 2001, Franklins and Coles agreed that Franklins would sell its business in Mentone to Coles. Franklins subsequently rescinded the Mentone BSA. The appellant pleaded, amongst other things, that Franklins and Coles had conspired to deprive an "independent operator" of the benefit of the Mentone BSA by breaching the undertakings given to the ACCC, and that Coles and Franklins' lessor had conspired with an intention of injuring an "independent operator", being a party that would enter into an agreement to purchase Franklins' Mentone business, by unreasonably withholding its consent contrary to the lease agreement. The judge found that there was no basis for the claim as pleaded, *ie* that the lessor or Coles intended to injure a class of persons known as "independent operators" who could be any member of the public apart from large supermarket operators. He refused leave to amend the pleadings. On appeal, Kiefel and Jacobson JJ agreed with the judge that the appellant's pleadings were defective (*Dresna* at [7]). They also rejected the appellant's argument that the appellant's specific identity need not be known at the time the conspiracy was entered into. The court thought that the authorities established that the intention had to be directed to a particular person or ascertainable members of a class (*Dresna* at [8]–[11]); what was required was for the conspirators to have acted *in order* that, and *not with the result* that, the claimant should suffer damage (*Dresna* at [12]).

1 0 7 *Dresna* was subsequently followed in *Australian Wool Innovation Ltd v Ingrid Newkirk and others* [2005] FCA 209 ("*Newkirk*"). There the applicant claimed to represent some 30,000 Australian woolgrowers in a claim against the respondents for conspiracy by, among other things, having organised a boycott to stop the sale of Australian-produced wool in other countries. The applicant subsequently applied to add 103 companies as applicants to the cause of action in conspiracy. Hely J considered that the pleading of conspiracy, the objects of which were some 30,000 woolgrowers and/or the first to 104th applicants, gave rise to the question of whether such a conspiracy would be sufficiently targeted to be actionable at the suit of these particular claimants (*Newkirk* at [68]). Hely J found that this pleading was embarrassing and deficient, and the claim for conspiracy was struck out with liberty to replead.

108 While these stand as authorities that reflect an unwillingness to expand the scope of the conspiracy torts, there are other decisions which might appear to be incongruous with *Dresna* or might be said at least to have broadened the test of what it means to target a group of persons in a claim for unlawful means conspiracy. In *Stanley and Ors v Layne Christensen Company and Ors* [2006] WASCA 56 ("*Stanley*"), the first defendant sold his shares in the second plaintiff to the first plaintiff and entered into a consultancy agreement with the first and second plaintiffs by which he

undertook not to solicit for himself or for any other person any business which would be in competition with the second plaintiff or any related to affiliated corporation. The first defendant subsequently assisted in the setting up of the other defendants' businesses which were competitive with the second plaintiff. In the meantime, the second plaintiff assigned its assets to the third and fourth plaintiffs. The plaintiffs pleaded, amongst other things, a cause of action in conspiracy whereby the defendants had agreed to commit unlawful acts with the intention of injuring the third and fourth plaintiffs. The defendants sought to have this pleading struck out, arguing that they were not given notice of the assignment of assets to the third and fourth plaintiffs, nor were they even aware of their existence and as such there were no grounds to argue that the defendants conspired to injure these two companies.

109 The Court of Appeal of Western Australia, on a hearing of the appeal against the master's refusal to strike out, said that while it accepted the approach in *Dresna* as correct, *Dresna* did not determine the issue before the court, because it was arguable on the facts of *Stanley* that the conspiracy was directed at every member of the group having the benefit of the non-competition clause, and while "[t]he members of that group may vary over time … its membership would be ascertainable at any particular date" (*Stanley* at [47]). It was also arguable that the class of persons that the defendants intended to injure was possible to define with sufficient precision and to point to facts that showed that the defendants were aware of the existence of the third and fourth plaintiffs.

110 In a somewhat similar vein, in *British American Tobacco Australia Limited v Gordon & Ors (No 3)* [2009] VSC 619 ("*BATAL*"), Kaye J concluded, somewhat controversially, that an alleged conspiracy entered into between 1987 and 2002 to destroy documents that could be used by prospective claimants, meaning persons who had or could have commenced proceedings against the conspirators for damage and injury arising from smoking the cigarettes manufactured by the conspirators, could be pleaded. Although the members of this class might vary over time, they were ascertainable at any particular date (*BATAL* at [37]). However, it seems to us, with respect, that Kaye J defined the relevant class of persons in a tautological fashion, noting that these would be persons who issued proceedings against the claimants from time to time. Kaye J conceded in *BATAL* (at [36]–[37]) that "[t]he precise point of distinction between *Dresna* and *Stanley*" was a difficult one but resolved those cases on the basis that in *Dresna*, there was no class of persons that could be identifiable because the person who would suffer injury would come from an amorphous group of the public at large. In contrast, membership of the group which was the target of the conspiracy in *Stanley* could be ascertained at any date.

111 While we agree, in principle, that a conspiracy can be targeted at a class of persons, in our judgment, the members of that class must be ascertainable at the time the conspiracy is entered into or it must at least be shown that the conspiracy was referable to that person having regard to the mental element for conspiracy. Particular caution must be exercised in cases where membership of the relevant class varies over time. A contrary approach which leaves the membership of the class indeterminate would threaten to blur the conceptual distinction that needs to be maintained between the tort of negligence and conspiracy torts. Moreover, if the relevant class of persons were indeterminate, the problem of finding the class by the application of tautological reasoning would likely arise (see *The Law of Torts in Singapore* at para 15.06). Indeed, this was the very problem in *BATAL*. We thus prefer a stricter approach by insisting on a tight nexus between the element of intention and the members of that class who are targeted by the defendants.

Application to the facts

112 In the light of these principles, we turn to assess the appellants' claim against the respondents on the facts. To succeed in a claim for conspiracy by unlawful means of conspiracy, the appellants

must show that:

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts were be performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy (*Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80 at [23]; *Tjong Very Sumito and others v Chan Sing En and others* [2012] SGHC 125 at [186]).

The elements of combination and intention were the controversial elements in this appeal, and we will analyse each of them in light of the facts.

The combination

113 The appellants must show that there was an agreement between the respondents, Mr Hsiao, Mr Lu and Mr Chiao to pursue a particular course of conduct, and that concerted action was taken pursuant to that agreement (*Carty* at p 128; *The Law of Torts in Singapore* para 15.052). The existence of a combination is often inferred from the circumstances and acts of the alleged conspirators (*Kuwait Oil Tanker Co SAK and another v Al Bader and others (No 3)* [2000] 2 All ER (Comm) 271 ("*Kuwait Oil Tanker*") at [110]; *Asian Corporate Services (SEA) Pte Ltd v Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR(R) 901 at [19]; *The "Dolphina"* [2012] 1 SLR 992 ("*Dolphina*") at [262]–[264]). It is also accepted that the parties must be "sufficiently aware of the surrounding circumstances and share the object for it properly to be said that they were acting in concert at the time of the acts complained of" (*Kuwait Oil Tanker* at [111]).

114 In our judgment, the element of an agreement or a combination is not satisfied on the facts. It is meaningless to speak of an agreement or combination in the absence of a common understanding of the material facts being shared by all the alleged conspirators. Of particular importance is the fact that Mr Chiao and Mr Hsiao were looking to mislead a prospective investor to invest in EIMC on the basis of conveying a misimpression of EIMC's financial health. As we have noted above (at [40]–[48]), the only facts shown to have been known by the respondents was that EIMC had been attempting, though unsuccessfully on many occasions, to obtain bank financing and the issuance of a letter of credit in order to pay for the Hulls. The correspondence between Ms Lim and EIMC's representatives all related to the latter's efforts to obtain finance from the banks. There was clearly a basis to find that the respondents and EIMC's representatives agreed upon a scheme to convey a false picture to a bank as to EIMC's payment for and interest in the Hulls in order to persuade it to extend a refinancing arrangement to EIMC on the strength of its mistaken belief. But the evidence went no further than this.

115 The respondents had no knowledge that a prospective investor would come onto the scene, much less that Mr Chiao and Mr Hsiao would devise a different scheme to hoodwink that investor. The fraud practised on the appellants had nothing to do with any payment being made to the respondents for the Hulls. Nor was this fraud founded on the notion that the respondents would convey title to the Hulls upon any payment; in fact part of the deception was that the Hulls had already been acquired. The truth was that the respondents were themselves a victim of a fraud within a fraud. Therefore, it

cannot be said that they were party to the combination shared by Mr Hsiao, Mr Chiao, Mr Lu and/or EIMC's representatives, and we agree with the Judge's findings. In the absence of a combination or agreement between the respondents and those who actually defrauded the appellants, the claim in conspiracy was doomed to fail.

Intention

116 In the light of our finding that there was no agreement or combination, it would follow that the appellants would not be able to show the requisite intention to injure them. To put it simply, the respondents were party to a different combination that did not contemplate the existence of the appellants at all, and it would follow that the respondents did not have the intention to injure the appellants. The appellants' case was founded on the notion that it was reasonably foreseeable that EIMC would seek out equity investors, aside from the banks, to finance the purchase of the *Ocean Lala*. The appellants argued that on the evidence, Ms Lim had admitted that finance for EIMC's purchase of the *Ocean Lala* could come from new shareholders investing in EIMC. Reliance was placed on the following exchange during the cross-examination of Ms Lim below: [note: 91]

> Q: By June or July 2006, that is about eight months after the November 2005 contract, you knew that while EIMC can continue discussing with various banks for bank facilities, EIMC must still take care of the 20 per cent downpayment; is that correct?
>
> A: Yes.
>
> Q: And so one of the effective ways to take care of this 20 per cent downpayment is to get the existing shareholders or new shareholders to inject money into EIMC; is that correct?
>
> A: Whichever.
>
> Q: Yes. Thank you.

The fact that it might have been foreseeable that persons in the position of the appellants could be harmed by the respondents' conduct is wholly insufficient for the purposes of unlawful means conspiracy. The respondents knew neither of the appellants' existence at the relevant time nor even the fact that the equity investors would be approached. They certainly never set out to injure the appellants. Moreover, even if they were indifferent as to who paid for their Hulls, this was just not what transpired in this case. The appellants invested in the company as a result of a slew of falsehoods that were intended to and did persuade them that this was a sound investment. These were totally different in nature and went well beyond the falsehoods to which the respondents were party. The respondents never intended to harm the appellants (or any class of investors who were keen to invest in the company) even as a means to an end. Nothing in the evidence supported the appellants' contention that the appellants, or for that matter, any equity investor, would be within the class of persons intended to be harmed by the respondents. What EIMC's representatives did was to use some of the material that had been created with the participation of the respondents to then engage in a scheme that was of a wholly different sort to that which had originally been contemplated. Even assuming that the later fraud was a foreseeable consequence of the respondents' actions, this was nowhere near sufficient to show the requisite intent to injure.

117 Finally, we note that the appellants' claim plainly could not have been made good on the basis of joint tortfeasance for deceit, which could have governed the appellants' claim. In *Clerk & Lindsell* at paras 4-03 and 4-04, the learned authors helpfully summarise the law on joint tortfeasorship as follows:

> … Who, then, are joint tortfeasors? One way of answering the question is to see whether the cause of action against each tortfeasor is the same. … They will be jointly liable for a tort which they both commit or for the commission of which they are both responsible, but not where each is independently responsible for a separate tort and the two torts combine to produce the same damage.
>
> Thus, the agent who commits a tort on behalf of his principal and the principal himself are joint tortfeasors; so are the employee who commits a tort in the course of his employment and his employer; so are an independent contractor who commits a tort and his employer … *Apart from these instances, concerted action is required. Where one person instigates another to commit a tort, they are joint tortfeasors; so are persons whose respective shares in the commission of a tort are done in furtherance of a common design.* … anyone complicit in the commission of a deceit may likewise be regarded as a joint-tortfeasor so long as there is a common design. But mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action towards a common end. …
>
> [emphasis added]

On these principles, the appellants would not have been able to succeed against the respondents as joint tortfeasors with Mr Hsiao, Mr Lu and Mr Chiao for the tort of deceit because there was no common design or concerted action between the respondents and those other parties.

118 In *Total Network*, the House of Lords rejected the notion that unlawful means conspiracy is merely a form of secondary liability duplicating the liability that would be imposed on conspirators as joint tortfeasors (*Total Network* per Lord Walker at [101]–[104]; per Lord Mance at [116]; and per Lord Neuberger at [225]–[226]). As we have said above, we leave this open for another occasion; but the fact that the appellants would not have succeeded in showing that the respondents were joint tortfeasors in deceit fortifies our conclusion that no liability can be imposed on the respondents for unlawful means conspiracy on the basis of the fraudulent misrepresentations that were made to Mr Qin.

Conclusion

119 For the reasons set out above, we dismiss the appeal. Although the respondents have prevailed, we took a very dim view of the conduct of the respondents in this case. Such conduct was wholly lacking in probity and likely also to have been unlawful. But the question posed to us was whether they were liable to the appellants for the tort of unlawful means conspiracy and we are satisfied that the answer to that specific question is in the negative. Nonetheless, to signal our disapproval of the respondent's conduct we order that the respondent should only have 75% of the costs of the proceedings below.

120 As to the costs of the appeal, in the final analysis, there were no merits in the appeal and we consider that there is no reason for us not to award the costs of the appeal to the respondents. We accordingly do so. We make no order as to the costs of the Summons. We also make the usual consequential orders.

[note: 1] Record of Appeal ("ROA"), vol III Part E, p 40 para 4

[note: 2] The Judgment at [49]

[note: 3] The Judgment at [34]

[note: 4] ROA vol II, p 9 para 2

[note: 5] The Judgment at [2]

[note: 6] The Judgment at [7]

[note: 7] The Judgment at [5]

[note: 8] The Judgment at [8]

[note: 9] ROA, vol III Part E, p 42 para 8

[note: 10] ROA, vol III Part E, p 43 para 10

[note: 11] ROA, vol III Part E, p 44 para 14

[note: 12] The Judgment at [33]; ROA, vol III Part E, p 51 para 25

[note: 13] ROA, vol III Part E, p 45 para 16

[note: 14] ROA, vol III Part E, p 51 para 29

[note: 15] The Judgment at [51]

[note: 16] ROA, vol III Part E, p 53 para 30

[note: 17] The Judgment at [34] and [78]

[note: 18] The Judgment at [36]

[note: 19] The Judgment at [52]; ROA vol III Part E, p 54 para 34

[note: 20] The Judgment at [37]

[note: 21] The Judgment at [52]

[note: 22] ROA, vol III Part E, p 55 para 35

[note: 23] NE, 9 Apr 2012, pp 77–78; p 103

[note: 24] ROA, vol III Part E, p 55 para 35

[note: 25] ROA, vol III Part E, p 55–57

[note: 26] ROA, vol III Part F, p 66; ROA Vol IV Part C, p 132

[note: 27] ROA, vol III Part E, p 58 para 46

[note: 28] ROA, vol II p 93

[note: 29] ROA, vol II p 202 para 16.4

[note: 30] NE, 10 Apr 2012, pp 123–124; pp 103–114

[note: 31] ROA, vol III Part E, p 61 para 53

[note: 32] Appellants' Core Bundle ("ACB") vol II, pp 10–13

[note: 33] ROA, vol III Part E, p 62; ROA, vol IV Part A, pp 106–107

[note: 34] ROA, vol III Part E, p 62 para 55

[note: 35] ROA, vol IV Part C, p 169

[note: 36] ROA, vol IV Part C, p 170

[note: 37] ROA, vol III Part F, p 79

[note: 38] ACB, vol II, p 75

[note: 39] ROA, vol IV Part C, pp 174–175

[note: 40] NE, 11 Apr 2012, p 61

[note: 41] ROA, vol III Part E, p 66 para 64

[note: 42] NE, 11 Apr 2012, p 97

[note: 43] ROA, vol III Part E, p 69 para 73

[note: 44] ROA, vol II p 208

[note: 45] ROA, vol III Part E, p 68 para 70

[note: 46] ROA, vol III Part E, pp 68–69

[note: 47] ROA, vol III Part E, p 70

[note: 48] ROA, vol III Part E, p 71

[note: 49] ROA, vol II p 211

[note: 50] NE, 11 Apr 2012, p 93

[note: 51] NE, 11 Apr 2012, pp 91–93; ROA vol IV Part D, pp 77–78

[note: 52] NE, 11 Apr 2012, p 93

[note: 53] ACB, vol II, p 72

[note: 54] NE, 2 Apr 2012, pp 24–25

[note: 55] ROA, vol II, pp 111–112

[note: 56] The Judgment at [19]–[22]; ROA, vol II p 138; vol III p 57

[note: 57] ROA, vol III Part F, p 3

[note: 58] NE, 3 Apr 2012, p 33

[note: 59] The Judgment at [26]

[note: 60] ROA, vol III Part B, pp 59–63

[note: 61] ROA, vol III Part B, p 63 para 84

[note: 62] ROA, vol III Part B, p 64

[note: 63] NE, 3 Apr 2012, p 33

[note: 64] ROA, vol III Part D, pp 112–118

[note: 65] ROA, vol III Part B, p 69 para 96

[note: 66] ROA, vol II p 208; ROA vol IV Part E, pp 49–50

[note: 67] ROA, vol III Part E, p 69 para 77

[note: 68] ROA, vol III Part B, p 74 para 107

[note: 69] The Judgment at [3]

[note: 70] ROA, vol II pp 25–26, para 7.26; vol III Part B, p 31 para 15

[note: 71] The Judgment at [59]–[60]

[note: 72] ROA, vol III Part E, p 77

[note: 73] The Judgment at [80]

[note: 74] The Judgment at [80]–[85]; Plaintiff's Further Submissions in the Suit filed 29 Nov 2012, paras 38–39

[note: 75] Respondents' Case ("RC"), para 40

[note: 76] RC, paras 61–64

[note: 77] ROA, vol IV Part A, p 102

[note: 78] ROA, vol III Part E, pp 46–48, 219

[note: 79] ROA, vol III Part E, p 49, para 22

[note: 80] ROA, vol III Part E, p 49, para 22

[note: 81] ROA, vol III Part E, p 263

[note: 82] ACB, vol II, p 73

[note: 83] ROA, vol III part E, p 52

[note: 84] NE, 11 Apr 2012, pp 64–66, 73–75

[note: 85] The Judgment at [35]

[note: 86] ACB vol I, p 74

[note: 87] NE, 10 Apr 2012, pp 57–69

[note: 88] NE, 11 Apr 2012, pp 2–3

[note: 89] ACB vol I, p 77

[note: 90] ROA, vol III Part E, pp 61–62

[note: 91] NE, 10 Apr, pp 46–47